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N. 3005

No. 14999

United States

Court of Appeals

for the Ninth Circuit

FRANK ROSS, Appellant,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation, Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

FILED

FEB 23 1956

PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —2-8-56

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

Attorneys for Appellant:

PACHT, ROSS, WARNE & BERNHARD,
STUART L. KADISON,

6535 Wilshire Boulevard,
Los Angeles 48, California.

Attorneys for Appellee:

MUSICK, PEELER & GARRETT,
HAROLD F. COLLINS,

621 South Hope Street,
Los Angeles 17, California. [1*]

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* Page numbers appearing at foot of page of original Transcript of Record.

In the District Court of the United States, Southern District of California, Central Division

No. 18714-TC

FRANK ROSS, Plaintiff,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, a New York Corporation, JOHN DOES I through XX and DOE CORPORATIONS I through X, Defendants.

COMPLAINT

[Breach of Contract]

Plaintiff Complains as follows:

I. Jurisdiction

A. Diversity of Citizenship.

As hereinafter more fully appears, plaintiff is a citizen of the State of California, and all of the defendants are citizens of states other than the State of California. Jurisdiction is grounded upon Title 28, U.S.C., Section 1332(a)(1). [2]

B. The Amount in Controversy.

As hereinafter more fully appears, the amount in controversy, exclusive of interest and costs, exceeds the sum or value of Three Thousand Dollars.

II. The Parties

A. Plaintiff Frank Ross:

Plaintiff Frank Ross is a citizen of the State of

California and a resident of the County of Los Angeles, State of California.

Plaintiff is assignee of F. R. Pictures, Inc., a California corporation, now dissolved, of 92% of its interest in the proceeds of a written agreement of sale dated August 11, 1952, by and between F. R. Pictures, Inc., Frank Ross Productions, Ltd. and defendant Twentieth Century-Fox Film Corporation, which said agreement is hereinafter more particularly described. He brings this action in his own behalf and in behalf of the assignees of the other 8% interest in said agreement.

B. Defendants:

1. Twentieth Century-Fox Film Corporation. Defendant Twentieth Century-Fox Film Corporation (sometimes hereinafter referred to as "Fox") is a New York corporation and is a citizen of that state. It conducts its business, and upon information and belief is authorized to conduct its business, in the State of California and in the Southern District of California.

2. The Fictitiously Designated Defendants. Defendants John Doe I through XX and Doe Corporations I through X are sued herein by such fictitious names by reason of the fact that their [3] true names, capacities and identities are presently unknown to plaintiffs. As and when plaintiffs ascertain such true names, capacities and identities, plaintiffs will move the Court to amend this Complaint to reflect the same. On information and belief, none of said defendants who may be indis-

pensable parties herein, are citizens of the State of California.

III. The Agreement of Sale

On or about August 11, 1952, F. R. Pictures, Inc. (sometimes hereinafter referred to as "Pictures") and Frank Ross Productions, Ltd. (sometimes hereinafter referred to as "Productions") on the one hand, and defendant Fox on the other, entered into a written agreement, a copy whereof is annexed hereto and hereinafter referred to as Exhibit A. In full consideration of all of the rights, licenses, privileges and property sold and transferred thereby to Fox, said defendant agreed to pay to Pictures a sum equal to 20% of the net profits, as said term is defined in said agreement and is hereinafter more particularly defined, from the distribution of a motion picture photoplay then tentatively entitled "The Robe", for so long a period as Fox should be required to pay to RKO Radio Pictures, Inc. a portion of said net profits. Thereafter, and commencing with such date as Fox should no longer be obliged to pay any portion of the net profits to RKO Radio Pictures, Inc., Fox agreed to pay to Pictures a sum equal to 25% of the net profits from the distribution of said motion picture.

On or about August 13, 1952, Pictures and Productions on the one hand, and Fox on the other, entered into a written "Supplemental Agreement", a copy whereof is annexed hereto and hereinafter referred to as Exhibit B. [4]

IV. Performance of Conditions Precedent

Pictures and Productions duly performed all of the conditions contained in said agreement of sale, Exhibits A and B hereof, to be performed on their part.

V. Dissolution of Pictures and Assignment of Its Assets to Plaintiff

On February 9, 1953, Pictures filed with the Secretary of State of the State of California, a "Certificate of Winding Up and Dissolution". Prior thereto and on February 3, 1953, Pictures, in writing, transferred, assigned and conveyed 92% of any and all of its assets of every kind and character to plaintiff. Without limiting the generality of the foregoing, on February 3, 1953, in writing, Pictures transferred, assigned and conveyed to plaintiff 92% of the following:

(a) Exhibits A and B hereof;

(b) Any and all monies which, in the absence of said assignment would have been payable by Fox to Pictures under and pursuant to the terms of Exhibits A and B hereof; and

(c) Any and all rights and benefits of Pictures in, under and pursuant to the terms of Exhibits A and B hereof, including, but not limited to, the right to have accountings, and receive, sue for, and collect monies thereunder in the same manner and to the same extent as Pictures could have done in the absence of said assignment. [5]

VI. Negative Cost

Under the terms of Exhibit A and particularly paragraph XIX (h)(1) thereof, within 90 days after the completion of the negative of the motion picture photoplay entitled "The Robe" (which said motion picture photoplay is sometimes referred to as the "Photoplay") Fox agreed to deliver to Pictures an itemized statement of the negative cost of the Photoplay, reflecting the negative cost of the Photoplay computed and determined in the manner set forth in Exhibit A. The negative of the Photoplay was completed on May 8, 1953. Fox failed, neglected and refused to deliver to Pictures said itemized statement of negative cost within 90 days from and after May 8, 1953.

On or about December 5, 1953, Fox did deliver to Pictures a statement of negative cost described on the face thereof as "Incomplete", and on or about September 22, 1954 a final statement of negative cost was delivered to plaintiff by Fox. Neither of said statements were furnished in compliance with the terms of Exhibit A and specifically paragraph XIX(h)(1) thereof.

Prior to the receipt of the statement of September 22, 1954 and immediately after the receipt of said incomplete statement of December 5, 1953, plaintiff notified Fox that said statement was inaccurate. Fox failed and refused to correct the same.

VII.

The statement of negative cost furnished on Sep-

tember 22, 1954 reflects a total negative cost for purposes of plaintiff's participation in profits under the terms of Exhibit A and B hereof in the amount of $3,837,785.98.

On information and belief said figure of negative cost is incorrect and improper and not in compliance with the terms of Exhibit A and B hereof, and in breach thereof, in that: [6]

A. As part of the negative cost of the Photoplay, Fox included a charge of $5,000.00 for a Cinemascope lens. Said Cinemascope lens is the property of Fox and should have been treated as a capital expenditure of Fox and in no circumstances included as part of the cost of the Photoplay.

B. Under the terms of Exhibit A, and particularly of paragraph XIX(c) thereof, overhead charges for production of the Photoplay were to be computed in the same manner as the same would have been computed had the photoplay been produced by Universal Pictures Corporation. Reference is made to said paragraph of Exhibit A for the particulars thereof. Under the terms of Exhibit A and particularly of said paragraph, overhead charges were not to exceed 25% of direct charges.

In breach of the terms of Exhibit A, Fox made a charge against the negative of the Photoplay as part of the negative cost thereof, for purposes of computing plaintiff's participation in the net proceeds of the same in the amount of $1,205,612.07 by reason of general overhead and direct production services. Said figure of $1,205,612.07 represents 51.695% of the direct costs of the motion picture

after adjustments pursuant to the terms of Exhibit A. Had Fox complied with the terms of Exhibit A in computing overhead charges and in restricting the same to 25% of the direct costs of the Photoplay, the amount charged by way of overhead would have been $583,043.53, and the net profits of the motion picture photoplay, in which plaintiff is entitled to participate to the extent of 25% thereof pursuant to the terms of Exhibit A, would have been increased by the amount of $622,568.54.

Despite demand, Fox has failed and refused and still does fail and refuse to adjust its computation of negative cost to conform to the terms of Exhibit A. By reason of such failure and refusal and the breach of the terms of Exhibit A by Fox, plaintiff has been damaged to the extent of 25% of $622,-568.54, or in the amount of $155,642.08. [7]

VIII. Definitions

Under the terms of Exhibit A and particularly paragraph XI(c) thereof, defendant Fox agreed to pay to Pictures a percentage of the net profits from the distribution of the Photoplay. Said agreement is more particularly alleged in paragraph III hereof and in Exhibit A hereto. Under the terms of Exhibit A, the "net profits" from the distribution of the Photoplay were required to be computed and determined in the same manner as the "net profits" from the distribution of the Photoplay were to be computed and determined under an agreement entered into by Fox on the one hand, and RKO Radio

Pictures, Inc. on the other, under date of August 11, 1952, subject to certain provisions set forth in paragraph XIX of Exhibit A.

Under the terms of said Fox-RKO Radio Pictures, Inc. agreement, a definition of "net profits" was adopted for purposes of accounting as between Fox and RKO, whereby "net profits" were defined as the amount remaining after there should have been deducted from the "gross receipts" of the Photoplay, the "distribution fees" of Fox, the "distribution expenses" of Fox and the "negative cost" of the Photoplay. Under the terms of said Fox-RKO Radio Pictures, Inc. agreement "gross receipts", "distribution fees" and "distribution expenses" were defined as follows:

(a) Gross Receipts:

"The 'gross receipts' of the Picture are hereby defined to mean all monies actually received by Fox for the right to exhibit the Picture by any method or means and from the disposition of distribution or exhibition rights therein. The gross receipts [8] shall include revenue from any reissue of the Picture, but shall not include any revenue from any remake or sequel thereof. The gross receipts shall not include any revenue received by Fox from trailers or from lithographs, lobby displays, slides or advertising accessories prepared and distributed in connection with the Picture. No monies in the nature of security deposits or periodic payments received by Fox or any of its subsidiary corporations or distributing agencies shall be deemed to be in-

cluded as part of the gross receipts unless the same shall have been earned or forfeited. Whenever Fox shall receive monies in partial payment of license fees due for the Picture together with other things, such partial payments shall be allocated between the Picture and such other things in such reasonable manner as Fox shall determine."

(b) Distribution Fees:

"(i) Twenty-five percentum (25%) of all gross receipts from distribution of the Picture in the United States and its territories and possessions, including Alaska.

"(ii) Thirty per centum (30%) of all gross receipts from all other territories throughout the world where the Picture is distributed by Fox or its subsidiaries.

"(iii) Twenty-five per centum (25%) of all gross receipts received by Fox from sub-distributors of the Picture. Subsidiaries of Fox shall not be considered sub-distributors. Motion Picture Export Association shall be considered a sub-distributor. [9]

"(iv) Ten per centum (10%) of all net proceeds received by Fox from the outright sale of the Picture in a particular territory for a specified period of time for a lump sum consideration, as distinguished from sub-distribution under sub-paragraph (iii) immediately preceding."

(c) Distribution Expenses:

"(i) Cost of positive prints, dupe negatives, lavenders, master and other prints of the Picture.

"(ii) Any and all taxes, imposts, duties, quotas, charges for import permits or permits to transfer currency and governmental fees of any nature which Fox or its subsidiary, affiliated or allied companies shall pay or be required to pay for or in connection with or in respect of said Picture or the distribution, exhibition or other disposition thereof or the collection or transfer of the proceeds, or an account of or measured by the proceeds from the leasing, licensing or distribution thereof, and all disbursements for licenses to permit the distribution of said Picture including, but not limited to, royalties on account of sound recordation or dubbing and music royalties and taxes, provided, however, that nothing herein contained shall be deemed to permit Fox to charge under this subdivision any of the net income, franchise, excess profits, corporation, or other similar taxes, imposed upon Fox or any of its subsidiaries as corporate enterprises, as distinguished from taxes imposed by reason of the distribution of the Picture, or based on the gross receipts thereof.

"(iii) All charges incurred by Fox for cost of procuring copyright, checking expenses, proportionate share of Fox's dues to Motion Picture Association of America, Inc., proportionate share of losses on all quota pictures properly allocable to the Picture, censorship charges, duties, insurance premiums, cost of re-editing or re-cutting and cost of titles and translations.

"(iv) Expenses, including attorneys' fees, incurred in preventing infringements of copyright of the Picture, unauthorized exhibition or distribution

of the Picture, and in recovering sums due under exhibition or distribution agreements, including the handling of percentage fraud matters, and also including expenses and attorneys' fees incurred in defending suits based on the Picture and claims in connection therewith. In the event that any such expenses or attorneys' fees incurred by Fox relate not only to the Picture but also to other pictures distributed by Fox, a proportionate share of such expenses shall be allocated to the Picture.

"(v) All cost of replacement or repair of prints or parts thereof and of transportation, packing and handling prints or parts thereof, and of superimposing, dubbing, spotting and recording sound tracks and titles.

"(vi) All expenses or charges for press books, art work, advertising, publicizing and exploitation or the Picture, but not including any expenses or charges for trailers, lithographs, lobby displays, slides or advertising accessories, revenue from which is excluded from gross receipts under the provisions of paragraph (a) of this Article 7." [11]

IX. Further Breaches and Damage

In addition to the breaches of Exhibit A enumerated in paragraph VII hereof, Fox has further breached and failed to perform the terms and conditions of Exhibit A in the following particulars, to plaintiff's damage in the amount of $314,474.38, which sum represents 25% of the aggregate of the following particularized breaches of the agreement.

A. Fox has made certain charges hereinafter enumerated as expenses of distribution, which said expenses were in truth and fact expenses of Fox in connection with the exploitation of its process Cinemascope. Said charges were and are institutional charges of said defendant and their inclusion as a portion of the expense of distribution of the Photoplay, is and was unauthorized and in breach of the terms of Exhibit A. There follows a schedule of such improper charges computed to and including March 26, 1955:

(1) Charged for "dupes" and lavenders" production expense of a demonstration motion picture to the end of exploiting Cinemascope—$64,255.22.

(2) Charged for "U. S. Advertising" the costs of demonstrating Cinemascope—$159,049.90.

(3) Charged for "Foreign Distribution Expenses" the cost of demonstrating Cinemascope in foreign countries and the expenses of acquisition and transshipment of equipment for the demonstration of the same to foreign countries—$193,872.74.

(4) Charged for "print costs" the cost of production of a motion picture entitled "Cinemascope Inaugurates New Screen Era"—$7,650.00. [12]

(5) Charged for "advertising" the cost of advertising Cinemascope and other products of Fox and not the Photoplay—$168,973.28.

(6) Charged for "Trade Paper Advertising" the cost of advertising Cinemascope and not the Photoplay—$18,277.05.

(7) Charged for "advertising" the cost of acquir-

ing accessories for Cinemascope and not for advertising the Photoplay—$11,067.20.

B. To and including March 26, 1955, Fox has included as a portion of gross receipts, for the purpose of calculating its distribution fee, the sum of $1,210,416.86 received by it by way of cooperative advertising contributions from exhibitors in the United States. Cooperative advertising receipts are by trade, custom and practice, a deduction from gross receipts, and by trade, practice and custom the percentage distribution charges attached to gross film rentals, less monies received by way of cooperative advertising contributions. Stated otherwise, cooperative advertising receipts are not properly a portion of gross film rentals to which the distribution percentages attach. Fox has calculated its distribution percentage on film rentals without first deducting receipts by way of cooperative advertising contributions in the amount of $1,210,-416.86 to and including March 26, 1955, and has thereby increased its distribution charge in violation of Exhibit A, in the United States, by the amount of $302,604.21 to and including said date. Said defendant has followed a similar practice in Canada and has included in gross receipts the sum of $41,765.45 received in Canada by way of cooperative advertising contributions to and including said date. Said defendant has thereby increased its distribution charge and reduced the amount to which plaintiff's percentage interest attaches, in violation of Exhibit A, in Canada, [13] by the amount of $12,529.64, to and including March 26,

1955, and in the aggregate amount of $315,133.85 in the United States and Canada. By reason thereof, to and including March 26, 1955 plaintiff has been damaged by said practice to the extent of 25% of said aggregate amount, or $78,783.46.

C. To and including March 26, 1955, Fox has charged as an expense of distribution and as a deduction from gross receipts in arriving at net profit, in violation of the terms of Exhibit A, income taxes in the countries of India, Pakistan and Ecuador, in the aggregate amount of $50,139.51. Said sum of $50,139.51 is not a proper expense of distribution and plaintiff has been damaged thereby in the amount of 25% thereof, or $12,534.88.

D. To and including March 26, 1955, said defendant has paid itself, in United States dollars, by way of distribution charges, the sum of $269,478.78 for distribution of the Picture in the countries of England, France, Italy and Japan, in all of which countries the proceeds of motion picture distribution are to a substantial extent frozen. Said distribution expense should properly, in the terms of Exhibit A and in accordance with established trade practice and custom, have been paid Fox in the currencies of the countries where they were earned and their payment in United States dollars was unauthorized and in breach and violation of the terms of Exhibit A, to plaintiff's damage in the amount of 25% thereof, or $67,369.69.

X.

As has been hereinabove noted, the breaches set

forth in paragraph IX hereof include breaches to and including March 26, 1955. On information and belief, Fox has since that date breached Exhibit A in other particulars, all of which are unknown to plaintiff but well known to said defendant. As and when plaintiff ascertains the [14] nature and extent of such further breaches and prior to judgment herein, plaintiff will move the Court for leave to file a Complaint supplemental to this Complaint, reflecting the amount of such further breaches.

Wherefore, plaintiff prays judgment as follows:

1. For and in the amount of $470,116.46, together with interest thereon at the rate of 7% per annum from and after September 22, 1954;

2. For such other and further amount as may be found due plaintiff by reason of the Supplemental Complaint to be filed herein.

3. For his costs and all proper relief.

PACHT, ROSS, WARNE & BERNHARD,
/s/ By N. JOSEPH ROSS,
/s/ STUART L. KADISON [15]

EXHIBIT A

AGREEMENT OF SALE

This Agreement, made and entered into on this 11th day of Aug., 1952, by and between F. R. Pictures, Inc., a California, corporation, hereinafter sometimes referred to as "Pictures", and Frank

Exhibit A—(Continued)

Ross Productions, Ltd., a California corporation, hereinafter sometimes referred to as "Productions", said Pictures and said Productions being hereinafter sometimes collectibly referred to as "Sellers", and Twentieth Century-Fox Film Corporation, a New York corporation, hereinafter referred to as "Purchaser".

Witnesseth:

I.

Sellers do hereby jointly and severally sell, grant, convey and assign unto Purchaser, its successors and assigns, forever, all of Sellers' respective right, title and interest, throughout the world, in and to the following literary works and compositions:

(a) That certain novel entitled "The Robe", written by Lloyd C. Douglas. Said novel was published in book form by Houghton Mifflin Company and was duly registered for copyright by and in the name of the said Lloyd C. Douglas on October 16, 1942, Entry No. A:168242 in the Office of the United States Register of Copyrights, Washington, D. C.

(b) All adaptations, dramatizations and other versions whatsoever of said novel, including, but not limited to, all screen stories, treatments, scenarios, screenplays and other literary works and compositions, based upon, adapted from, or otherwise related to said novel.

(c) All copyrights and all rights of copyright renewal in and to all of the aforementioned literary

Exhibit A—(Continued)

works and compositions set forth in paragraph (a) and paragraph (b) immediately preceding. [16]

II.

Sellers do hereby jointly and severally sell, grant, convey and assign unto Purchaser, its successors and assigns, forever, all of Sellers' respective right, title and interest, throughout the world, in and to each and all of the following contracts, agreements, assignments and/or documents covering or relating to said novel entitled "The Robe":

(a) Option Agreement, executed under date of June 26, 1942, by Lloyd C. Douglas and Houghton Mifflin Company in favor of Frank Ross.

(b) Option Agreement, dated November 14, 1942, executed by Lloyd C. Douglas and Houghton Mifflin Company in favor of Frank Ross.

(c) Letter, dated November 27, 1942, from Frank Ross, Inc. to Lloyd C. Douglas and Houghton Mifflin Company.

(d) Agreement, dated December 3, 1942, between Lloyd C. Douglas, as Author, Houghton Mifflin Company, as Publisher, (said Author and Publisher being sometimes designated therein as "sellers"), and Frank Ross, Inc., a California corporation, as Purchaser. Said Agreement was recorded on August 29, 1947, in Volume 641, Pages 51-59, in the Office of the United States Register of Copyrights, Washington, D. C.

(e) Letter Agreement, dated May 5, 1943, be-

Exhibit A—(Continued)

tween Frank Ross, Inc., Frank Ross Productions, Ltd., Lloyd C. Douglas and Houghton Mifflin Company. Said Letter Agreement was recorded on August 29, 1947, in Volume 641, Pages 60-61, in the Office of the United States Register of Copyrights, Washington, D. C.

(f) Assignment, dated June 4, 1943, executed by Frank Ross, Inc. in favor of Frank Ross Productions, Ltd. Said Assignment was recorded on August 29, 1947, in Volume 641, Page 62, in the Office of the United States Register of Copyrights, Washington, D. C.

(g) Assignment, dated January 4, 1944, executed by Frank Ross Productions, Ltd. in favor of F. R. Pictures, Inc.

(h) Consent, dated March 7, 1944, executed by Houghton Mifflin Company and Lloyd C. Douglas, approving the assignment executed by Frank Ross Productions, Ltd. in favor of F. R. Pictures, Inc., described in paragraph (g) of this Article II. [17]

III.

Under date of April 15, 1943, an Agreement was executed by and between Productions, as Producer, and RKO Radio Pictures, Inc., a Delaware corporation, (hereinafter in this Agreement referred to as "RKO") as Distributor, relating to the production and distribution of a motion picture photoplay to be based upon said novel entitled "The Robe". Said

Exhibit A—(Continued)

Agreement has heretofore been amended in various particulars.

Sellers do hereby jointly and severally sell, grant, convey and assign unto Purchaser, its successors and assigns, forever, all of Sellers' respective right, title and interest, throughout the world, in and to the following:

(a) The proposed motion picture photoplay which was to have been produced and distributed under said Agreement, dated April 15, 1943, as amended.

(b) All screen stories, treatments, scenarios, screen-plays and other literary material created, written or composed in connection with the preparation, production, advertising, publicizing, exploitation and/or other use of the proposed motion picture photoplay referred to in paragraph (a) immediately preceding, and all copyrights and all rights of copyright renewal in and to all of said literary material.

(c) All personal property of every kind, character and description, fabricated or manufactured in connection with the preparation, production, advertising, publicizing, exploitation and/or other use of the proposed motion picture photoplay referred to in paragraph (a) of this Article.

The grants in this Article specified shall not be deemed to be in limitation of the grants in Article I hereof specified.

Exhibit A—(Continued)

IV.

All of the rights, licenses, privileges, property and other interests sold, granted, conveyed and assigned by Sellers to Purchaser under Articles I, II and III of this Agreement are hereinafter collectively referred to as the "Property". [18]

V.

Sellers do hereby jointly and severally sell, grant, convey and assign unto Purchaser, its successors and assigns, forever, all of Sellers' respective right, title and interest, throughout the world, in and to the following:

(a) All contracts, agreements, assignments and/or other documents of every kind and character whatsoever under which Sellers, or either of Sellers, may have heretofore acquired or many hereafter acquire any right, title or interest in or to said "Property".

(b) All rights, licenses, privileges, property and other interests of every kind and character heretofore acquired or which may hereafter be acquired by Sellers, or either of Sellers, with respect to said "Property", and the benefit of all representations, warranties, covenants and agreements made by any person, firm or corporation under any and all contracts, agreements, assignments, and/or other documents, whether written or oral, relating to said "Property".

Exhibit A—(Continued)

VI.

Sellers represent and warrant to Purchaser:

(a) That all of the consideration provided to be paid under each and all of the contracts, agreements, assignments and/or other documents in Article II hereof referred to has heretofore been paid in full and/or otherwise discharged in full; that there is no existing or outstanding obligation whatsoever, either present or future, under any of said contracts, agreements, assignments, or other documents with respect to the payment of any consideration, monies or other compensation whatsoever thereunder; that all of the terms, covenants and conditions provided to be kept or performed under each and all of said contracts, agreements, assignments, and/or other documents have been kept and performed up to and including the date hereof; and that there is no existing breach or other act of default under any of said contracts, agreements, assignments or other documents.

(b) That the contracts, agreements, assignments and/or documents which are being delivered by Sellers to Purchaser concurrently herewith and pursuant to Article VIII hereof have not been amended, modified, supplemented or cancelled, except to the extent indicated in such contracts, agreements, assignments and/or documents. [19]

VII.

Sellers do hereby agree that Sellers shall at all

Exhibit 2—(Continued)

[illegible] and sole liability. Purchaser to surrender, assume, discharge and indemnify Seller and Seller's [illegible] against all claims, demands and liabilities of every kind, existing, contingent or otherwise, which may be asserted by Seller or any of Seller's representatives or successors under this Agreement.

VIII.

Concurrently with the execution hereof, Seller shall deliver to Purchaser the following:

(a) Duly executed assignments of [illegible] patents of each and all of the contracts, agreements, instruments and [illegible] specified in Article II hereof.

(b) All manuscripts of the literary works and compositions in this Agreement referred to and which may be in the possession of Seller.

(c) All personal property described in paragraph [illegible] of Article III hereof and which may be in the possession of Seller.

IX.

Seller shall upon request of Purchaser duly execute, acknowledge and deliver to Purchaser any and all further instruments or other instruments which may be necessary to convey, assign or confirm unto Purchaser or to [illegible] in any country in the world the rights in and "Property" herein granted to Purchaser.

Exhibit A—(Continued)

X.

Purchaser agrees to produce and distribute a motion picture photoplay to be based upon or adapted from said novel entitled "The Robe", which motion picture photoplay is hereinafter referred to as the "Picture". The Picture shall be a feature length, talking motion picture photoplay, with dialogue, music and sound. Purchaser agrees to commence principal photography of the Picture not later than November 2, 1953. Purchaser shall have the sole and complete control of the production, distribution, exhibition, exploitation, advertising, publicity and/or any other use of the Picture.

XI.

(a) Pursuant to the Agreement, dated April 15, 1943, between Productions and RKO (referred to in Article III hereof), RKO has heretofore advanced to Productions certain sums in connection with the preparation, production, advertising, publicizing and exploitation of the motion picture photoplay provided for under said Agreement. Said sums advanced by RKO are hereinafter referred to as the "RKO Costs". Under date of August 21, 1944, Productions executed in favor of RKO a Chattel Mortgage, Pledge and Assignment covering said "Property", as security for the repayment of RKO costs. RKO has heretofore brought an action against Productions in the District Court of the United States, for the Southern District of California, Cen-

Exhibit A—(Continued)

tral Division, seeking to foreclose said chattel mortgage, which action is numbered 10892-C in the files and records of said Court. Productions has filed in said action its answer and a counterclaim for declaratory relief and damages. Houghton Mifflin Company and the Executor of the Estate of Lloyd C. Douglas have filed in said action a motion to intervene therein, which motion has been ordered off calendar with leave to resubmit.

(b) Under date of August 11, 1952, an Agreement is being executed by and between Purchaser and RKO (which Agreement [21] is hereinafter referred to as the "Fox-RKO Agreement"). In the Fox-RKO Agreement, it is set forth that the total amount of the RKO Costs is in the sum of Eight Hundred Nineteen Thousand Seven Hundred Forty-Eight Dollars and Six Cents ($819,748.06), subject to adjustments as therein provided. The Fox-RKO Agreement provides, among other things, that RKO sells unto Purchaser all of RKO's right, title and interest in and to said "Property"; that in consideration of the rights, licenses, privileges and property sold by RKO to Purchaser under the Fox-RKO Agreement, Purchaser has paid to RKO the sum of Three Hundred Thousand Dollars ($300,000.00), and that Purchaser shall pay to RKO a sum equal to ten percent (10%) of the "net profits", if any (as computed and determined in the Fox-RKO Agreement), from the distribution of the Picture, until such time as RKO has been paid

Exhibit A—(Continued)

thereunder a total amount (including said sum of Three Hundred Thousand Dollars ($300,000.00) equal to the total amount of the RKO Costs.

(c) In full consideration of all the rights, licenses, privileges and property sold and transferred by Sellers to Purchaser hereunder:

(i) Purchaser shall pay to Pictures a sum equal to twenty percent (20%) of the "net profits", if any (as herein computed and determined), from the distribution of the Picture so long as Purchaser shall be required to pay to RKO, under the Fox-RKO Agreement, the portion of "net profits" in paragraph (b) of this Article specified.

(ii) At such date as RKO shall have been paid, under the Fox-RKO Agreement, the total amount of the RKO Costs, then, from and after such date (and in lieu of said twenty percent (20%) of the "net profits" specified in the paragraph immediately preceding), Purchaser shall pay to Pictures a sum equal to twenty-five percent (25% of the "net profits",) if any (as herein computed and determined), from the distribution of the Picture. [22]

It is agreed that the "net profits" under this Agreement shall be computed and determined in the same manner as the "net profits" are computed and determined under the Fox-RKO Agreement.

Sellers acknowledge that Purchaser has made no representation, warranty, guaranty or other agreement that any "net profits" will result from the distribution of the Picture.

Exhibit A—(Continued)

The sale or issuance of this profit participation is authorized by a permit of the Commissioner of Corporations of the State of California, and the profit participation interest assigned herein is subject to all of the terms and conditions set forth in said permit.

XII.

Sellers are entering into this Agreement upon the condition that RKO shall agree to do and shall do the following:

(a) To dismiss with prejudice the complaint filed by RKO in the aforementioned action (RKO vs. Productions).

(b) To accept payment of the RKO Costs in the manner specified under the Fox-RKO Agreement and referred to in paragraph (b) of Article XI hereof.

(c) To forbear from bringing any action to collect the RKO Costs from any source except under the Fox-RKO Agreement.

(d) To release the aforementioned "Property" Assigned by Sellers to Purchaser hereunder from any lien RKO may have thereon.

XIII.

In further consideration of the execution of this Agreement by Purchaser, Productions shall dismiss with prejudice its aforementioned counterclaim in the aforementioned action (RKO vs. Productions)

Exhibit A—(Continued)

at such time as RKO shall dismiss with prejudice its complaint in said action. [23]

XIV.

By Assignment, dated March 3, 1952, Betty Douglas Wilson and Virginia Douglas Dawson, distributees under the Last Will and Testament of Lloyd C. Douglas, deceased, and Houghton Mifflin Company, as assignors, jointly and severally assigned to Management Corporation of America, a California corporation, as assignee, all of their right to repurchase the rights assigned and conveyed by Lloyd C. Douglas and Houghton Mifflin Company to Frank Ross, Inc. under that certain Agreement, dated December 3, 1942, relating to said novel entitled "The Robe".

In consideration of the payment by Purchaser to said Management Corporation of America of the sum of Fifteen Thousand Dollars ($15,000.00), Sellers will cause to be delivered to Purchaser, concurrently with such payment, an assignment, executed by said Management Corporation of America, in favor of Purchaser, and in form satisfactory to Purchaser, under which said Management Corporation of America assigns to Purchaser all of its right, title and interest in and to said novel entitled "The Robe", under the aforementioned Assignment, dated March 3, 1952, or otherwise, and further, Sellers shall cause to be filed in the aforementioned action (RKO vs. Productions) an appropriate stipulation

Exhibit A—(Continued)

providing for the dismissal or withdrawal of the motion to intervene filed in said action by Houghton Mifflin Company and the Executor of the Estate of Lloyd C. Douglas.

XV.

Purchaser has succeeded to all of the right, title and interest of RKO in and to the aforementioned Agreement, dated April 15, 1943, as amended, between Productions and RKO. Concurrently herewith, and in further consideration of the execution of the within Agreement by Purchaser, Productions agrees to execute and deliver to Purchaser an instrument, in form satisfactory [24] to Purchaser, terminating and cancelling said Agreement of April 15, 1943, as amended.

XVI.

Under date of August 23, 1948, an Agreement was executed by and between Productions and Maxwell Anderson. Such Agreement provides, among other things, that the said Maxwell Anderson will write a "screenplay for 'The Robe' ".

In consideration of the payment by Purchaser to the said Maxwell Anderson of the sum of Ten Thousand Dollars ($10,000.00), Sellers shall cause to be delivered to Purchaser, concurrently with such payment, an instrument, executed by and between Productions and the said Maxwell Anderson, and in form satisfactory to Purchaser, terminating such Agreement of August 23, 1948, and all rights of the said Maxwell Anderson thereunder.

Exhibit A—(Continued)

XVII.

This agreement shall bind and inure to the benefit of the parties hereto and their successors and assigns forever.

XVIII.

It is agreed that the representation, warranties, promises, agreements and obligations of Sellers under this Agreement shall be deemed to be joint and several.

XIX.

As hereinabove specified, the "net profits" from the distribution of the Picture under this Agreement shall be computed and determined in the same manner as the "net profits" from the distribution of the Picture are computed and determined under the Fox-RKO Agreement, as executed under date of August 11, 1952, subject, however, to the provisions hereinbelow set forth: [25]

(a) The "net profits" from the distribution of the Picture under this Agreement shall be computed by deducting Purchaser's distribution fees, distributing expenses (such as cost of prints, advertising, etc.) and negative cost from the gross receipts of the Picture throughout the world, subject to the particular matters mentioned below.

(b) Purchaser's distribution fees shall be:

25%—distribution in the United States and Alaska;

30%—distribution in Canada and all other foreign territories;

Exhibit A—(Continued)

25%—sub-distribution;

10%—outright sales.

(c) The charge to negative cost on account of Purchaser's overhead shall be twenty-five percent (25%) of direct charges. However, if Purchaser's charge on account of overhead normally includes items of cost for which Universal Pictures Corporation makes a direct charge, Purchaser may also make a direct charge for such items, and if Purchaser does so and if the charge of Universal Pictures Corporation on account of overhead normally includes items of cost for which Purchaser makes a direct charge, Purchaser will not make direct charges for such items but will include such items of cost in Purchaser's charge on account of overhead; provided, however, that in no event shall Purchaser's charge on account of overhead be reduced below twenty-five percent (25%) by reason of such adjustments.

(d) The sum of Three Hundred Thousand Dollars ($300,000.00) specified in paragraph (b) of Article XI hereof as having been paid by Purchaser to RKO, shall be included in negative cost without studio overhead.

(e) There shall be no direct charge to negative cost on account of the salary of the leading man in the Picture.

(f) In no event shall any profit participations which may be payable to the leading man in the Picture, or to RKO, or to any other person, firm

Exhibit A—(Continued)

or corporation be chargeable against Pictures in computing the portion of "net profits" to which Pictures may be entitled under this Agreement.

(g) 1. Unless the laws or currency regulations of a country or territory totally or partially prohibit or restrict the withdrawal of monies therefrom, all sums received by Purchaser or its subsidiary corporations from the distribution or sale or other disposition [26] of distribution or exhibition rights in the Picture in any place foreign to the United States, under contracts made in terms of foreign currency, shall be transferred into United States dollars as reasonably promptly as the laws of the foreign country or territory and prevailing conditions will permit. Purchaser shall account for these sums in dollars at the actual rate of exchange, averaged over the reporting period, at which such monies were actually received by Purchaser in the United States. In no event shall any amounts derived from the distribution of the Picture in any country or territory other than the United States be deemed to accrue or be remittable to or for the account of Pictures unless and until such amounts have been actually received by Purchaser in the United States in dollars or are paid pursuant to subdivision 2. or subdivision 3. of this paragraph (g).

2. With respect to any country or territory whose laws or currency regulations totally or partially prohibit or restrict the withdrawal of monies

Exhibit A—(Continued)

therefrom, if Pictures shall so request Purchaser in writing, and if the applicable laws and regulations so permit, Purchaser shall deposit to the credit of Pictures, in a bank or banks in such country or territory approved by Pictures, or pay to such person or persons as Pictures shall designate in writing, any or all monies in the currency of said country or territory accruing to Pictures as its share of "net profits" from the distribution of the Picture therein. Purchaser will report to Pictures the sums so deposited or paid at the time of making the reports of gross receipts hereunder, and such deposits or payments shall constitute the remittance of the sums due Pictures hereunder to the extent so paid or deposited. Accountings by Purchaser of monies derived from countries or territories whose laws or currency regulations prohibit or restrict the withdrawal of monies therefrom may be made in the currency of such countries. Any expenses of Purchaser which are reimbursable under this Agreement and which may be incurred by Purchaser in United States dollars for or in such countries or territories, may be recouped by Purchaser in United States dollars from any monies received from the distribution of the Picture.

3. If payment is not made under subdivision 2. above and funds are withdrawn and actually received in the United States by Purchaser from a foreign country or territory whose laws or currency regulations permit only a partial withdrawal

Exhibit A—(Continued)

of funds, the portion of the funds so actually received by Purchaser which shall be allocated to the Picture in such country or territory may be made on such reasonable basis as Purchaser shall have at the time generally adopted for allocations of funds received from such country or territory or shall be that portion of the funds so actually received in dollars by Purchaser in the United States, which the gross receipts from the distribution of the Picture in said foreign country or territory bears to the total gross receipts of Purchaser in said foreign country or territory for the period for which the withdrawal applies. [27]

(h) 1. Purchaser agrees to keep full and accurate records of the negative cost of the Picture during the entire course of production thereof, which records shall show the details of such negative cost. Within ninety (90) days after completion of the negative of the Picture, Purchaser agrees to deliver to Pictures an itemized statement of the negative cost of the Picture, which statement shall show such negative cost computed and determined as herein set forth. Such statement may be changed, after it is delivered, to give effect to any items overlooked in its preparation, to correct any error in computation of any item included therein, or to give effect to any proper reallocation of charges. Any such change may be made within ninety (90) days after the completion of the annual audit of Purchaser's books next following completion of the

Exhibit A—(Continued)

negative of the Picture. At any time during the period of sixty (60) days after the receipt by Pictures of the said statement, Pictures shall have the right to commence an audit, at its own expense, of the said books and records for the purpose of verifying the correctness of said statement. Said audit shall be completed within thirty (30) days after the commencement thereof. If Pictures fails to commence an audit as hereinabove provided, then the negative cost of the Picture as set forth in said statement shall be conclusively presumed to be correct. If, on the basis of said audit, Pictures claims that the negative cost of the Picture is incorrectly stated in said statement, Pictures may so notify Purchaser, in writing, not later than thirty (30) days after completion of said audit, stating the particulars in which Pictures claims such statement to be inaccurate, and stating the amount which Pictures claims to be the correct negative cost of the Picture. If Pictures fails to so notify Purchaser, then the negative cost of the Picture shall be conclusively presumed to be as set forth in said statement. If Pictures notifies Purchaser, in accordance with the foregoing provisions, that Pictures claims that the negative cost of the Picture is incorrectly stated in said statement, then within thirty (30) days after receipt by Purchaser of said notice from Pictures, Purchaser may make a written demand that the matter be submitted for and determined by arbitration as hereinafter provided. If Purchaser

Exhibit A—(Continued)

does not make such demand, it shall be conclusively presumed that the negative cost of the Picture is as set forth in Pictures' said notice to Purchaser. If Purchaser demands that said matter be submitted for and determined by arbitration, such matter shall, within thirty (30) days thereafter, be submitted in writing in Los Angeles, California, to such national firm of certified public accountants as shall be acceptable to both Purchaser and Pictures, and, if said parties cannot agree upon said firm or accountants, then the firm of accountants to which the said matter shall be submitted shall be such national firm of public accountants as shall be designated by the American Arbitration Association. Both parties may submit [28] their views to the arbitrator in writing, and a copy of each communication sent by either party to the arbitrator shall be sent to the other party. The arbitrator may also secure advice and information independently. The decision of the arbitrator shall be final and binding upon the parties hereto with the force and effect of an arbitration award under Title 9, Part 3 of the Code of Civil Procedure of the State of California. The costs of any arbitration, pursuant to this Article, shall be divided between the parties in such manner as shall be determined by the arbitrator.

2. Purchaser agrees to keep full and accurate records relating to the distribution of the Picture. For a period of two (2) years after each transaction relating to the distribution of the Picture, a duly

Exhibit A—(Continued)

authorized representative of Pictures shall have the right of access to and inspection of the records at the places where the said records are ordinarily maintained, but only during business hours and at intervals not more frequently than semi-annually.

Purchaser shall render to Pictures reports with respect to the distribution of the Picture as follows:

(i) Purchaser shall render three (3) reports during the first thirteen (13) weeks after the Picture is in general distribution showing gross receipts from the distribution of the Picture and the costs and expenses in connection therewith.

(ii) Subsequent reports shall be rendered at intervals of approximately thirty (30) days, but after the first twelve (12) months after first exhibition of the Picture, Purchaser may render reports quarterly.

(iii) Purchaser shall pay to Pictures its share of net profits, if any, pursuant to this Agreement at the time of making each such report and in accordance therewith.

3. In case any controversy shall arise between the parties hereto as to any accounting by Purchaser with respect to the share of Pictures in the net profits of the Picture, the questions in controversy shall be submitted for determination to certified public accountants in the City of New York, acceptable to the parties hereto, and in the event of the failure of the parties to agree upon such firm of accountants, then said controversy shall

Exhibit A—(Continued)

be submitted for determination to such national firm of accountants in New York City as shall be designated by the American Arbitration Association in that city. Each party shall be given a reasonable opportunity, under all circumstances, to submit its views to the arbitrator, and a copy of each communication sent by either party to the arbitrator shall be sent to the other party. The arbitrator may also secure advice and information independently. The decision of the arbitrator shall be final and binding upon the parties hereto. The costs of any arbitration, [29] pursuant to this Article, shall be divided between the parties in such manner as shall be determined by the arbitrator.

XX.

It is understood and agreed that Sellers have and will have no lien or other right, title or interest whatsoever in or to the Picture, or the gross receipts or net profits thereof, and that the net profits of the Picture are referred to herein merely as a measure in determining the amount to which Pictures is and will be entitled under this Agreement. Nothing herein contained, however, shall be construed so as to prevent Pictures from proceeding against the Picture or any other property of Purchaser for the collection of any amounts which are due and unpaid hereunder, or as a waiver of any other right or remedy which Sellers may have at law or in equity.

Exhibit A—(Continued)

Nothing herein contained shall constitute a partnership between or joint venture by the parties hereto or constitute either party the agent or employee of the other.

XXI.

All notice which Pictures or Purchaser may be required or desire to give hereunder shall, unless otherwise specifically provided, be in writing. Such notices may be given by delivering them personally to an officer of either party authorized to accept service of process, or by addressing them to the addresses indicated below and by depositing them postage prepaid in the United States mail in the County of Los Angeles or by delivering them toll prepaid to a telegraph or cable company. In the event any notice is so mailed, telegraphed or cabled, it shall be conclusively deemed to have been given on the date of mailing or date of delivery to the telegraph or cable company. Purchaser's address for the giving of notices is P.O. Box 900, Beverly Hills, California. Pictures' address for said purpose is MCA Artists, Ltd., 9370 Santa Monica Boulevard, Beverly Hills, California. [30]

Either party may change its address specified in this Article by giving written notice to the other of such change, as herein provided.

In Witness Whereof, the parties hereto have executed this Agreement of Sale by their respective

Exhibit A—(Continued)

officers thereunto duly authorized as of the day and year first hereinabove written.

F. R. Pictures, Inc.

/s/ By Frank Ross

Frank Ross Productions, Ltd.

/s/ By Frank Ross

Twentieth Century-Fox Film Corporation

/s/ By Lew Schreiber,

Its Executive Manager

Commitment Approved: /s/ by FLM, date 8/14/52; /s/ by J. DiMuves, Legal Dept. date 8/19/52.

State of California,
County of Los Angeles—ss.

On this 13th day of August, in the year 1952, before me, Juanita J. Stansbury, a Notary Public in and for the said County and State, residing therein and duly commissioned and sworn, personally appeared Frank Ross, known to me to be the President of [31] F. R. Pictures, Inc., the corporation that executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto affixed my

Exhibit A—(Continued)

signature and official seal on the day and year in this certificate first above written.

/s/ Juanita J. Stansbury,
Notary Public in and for the County of Los Angeles, State of California.

State of California,
County of Los Angeles—ss.

On this 13th day of August, in the year 1952, before me, Juanita J. Stansbury, a Notary Public in and for the said County and State, residing therein and duly commissioned and sworn, personally appeared Frank Ross, known to me to be the President of Frank Ross Productions, Ltd., the corporation that executed the within instrument and known to me to be the person who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto affixed my signature and official seal on the day and year in this certificate first above written.

/s/ Juanita J. Stansbury,
Notary Public in and for the County of Los Angeles, State of California. [32]

State of California,
County of Los Angeles—ss.

On this 19th day of August, in the year 1952,

Exhibit A—(Continued)

before me, Juanita J. Stansbury, a Notary Public in and for the said County and State, residing therein and duly commissioned and sworn, personally appeared Lew Schreiber, known to me to be the Executive Manager of Twentieth Century-Fox Film Corporation, the corporation that executed the within instrument and known to me to be the person who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto affixed my signature and official seal on the day and year in this certificate first above written.

/s/ Juanita J. Stansbury,
Notary Public in and for the County of Los Angeles, State of California. [33]

EXHIBIT B

[Letterhead of Twentieth Century Fox Film Corp.]

F. R. Pictures, Inc., August 13, 1952
c/o MCA Artists, Ltd.,
9370 Santa Monica Boulevard,
Beverly Hills, California

Re: "The Robe" by Lloyd C. Douglas

Gentlemen:

Reference is made to an Agreement, dated August 11, 1952, by and between the undersigned,

Exhibit B—(Continued)

Twentieth Century-Fox Film Corporation (hereinafter called "Fox"), and RKO Radio Pictures, Inc., relating, among other things, to the production and distribution by Fox of a motion picture photoplay to be based upon or adapted from the novel entitled "The Robe", written by Lloyd C. Douglas, and to the acquisition by Fox of certain rights in said novel and in the other property in said Agreement set forth. Said Agreement is hereinafter called the "Fox-RKO Agreement".

Reference is also made to an Agreement of Sale, dated August 11, 1952, by and between you (F. R. Pictures, Inc.) and Frank Ross Productions, Ltd., as Sellers, and Fox, as Purchaser, also relating, among other things, to the production and distribution by Fox of said motion picture photoplay to be based upon or adapted from said novel entitled "The Robe", and to the acquisition by Fox of certain rights in said novel and in the other property in said Agreement of Sale set forth.

As an inducement to you to enter into, execute and deliver the said Agreement of Sale, dated August 11, 1952, Fox does hereby agree that, except as hereinafter expressly provided to the contrary, Fox will not, without first obtaining your written consent:

(1) Join in any amendment or other modification of the Fox-RKO Agreement, which amendment or other modification might adversely affect your profit participation under the said Agreement of Sale,

Exhibit B—(Continued)

[34] between you and Frank Ross Productions, Ltd. as the Sellers, and Fox, as the Purchaser;

(2) Enter into any agreement amending, modifying or supplementing the Fox-RKO Agreement in any manner or upon any terms or conditions, under or pursuant to which Fox or RKO will receive any benefit or consideration other than or in addition to that consideration to which Fox or RKO is entitled under the Fox-RKO Agreement as submitted to your counsel on August 13, 1952.

Notwithstanding the foregoing provisions hereof, it is expressly understood that Fox shall have the right to join in the amendment or modification of the Fox-RKO Agreement, without your consent, with reference to the following:

(a) Any or all of the changes in the Fox-RKO Agreement specified in that certain letter, dated August 8, 1952, addressed to Mr. Harry J. McIntyre by Joseph V. DiMuro, Esq., a copy of which letter was delivered to your counsel on August 13, 1952.

(b) The deletion from the Fox-RKO Agreement of the provision to the effect that the motion picture photoplay therein referred to shall star a leading man having a box office value substantially equal to that of Tyrone Power, provided neither Fox nor RKO shall receive any additional consideration or benefit therefor or in connection therewith.

Exhibit B—(Continued)

Yours very truly,

Twentieth Century-Fox Film Corporation

/s/ By Lew Schreiber,

Its Executive Manager

Form Approved: 20th Century-Fox Film Corp. Legal Dept. /s/ J. DiMuro. Date 8/20/52.

Accepted: F. R. Pictures, Inc., /s/ by Frank Ross; Frank Ross Productions, Ltd., /s/ by Frank Ross. [35]

State of California,
County of Los Angeles—ss.

On this 13th day of August, in the year 1952, before me Juanita J. Stansbury, a Notary Public in and for the said County and State, residing therein and duly commissioned and sworn, personally appeared Frank Ross, known to me to be the President of F. R. Pictures, Inc., the corporation that executed the within instrument and known to me to be the person who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto affixed my

Exhibit B—(Continued)

signature and official seal on the day and year in this certificate first above written.

/s/ Juanita J. Stansbury,
Notary Public in and for the County of Los Angeles, State of California.

State of California,
County of Los Angeles—ss.

On this 13th day of August, in the year 1952, before me Juanita J. Stansbury, a Notary Public in and for the said County and State, residing therein and duly commissioned and sworn, personally appeared Frank Ross, known to me to be the President of Frank Ross Productions, Ltd., the corporation that executed the within instrument and known to me to be the person who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto affixed my signature and official seal on the day and year in this certificate first above written.

/s/ Juanita J. Stansbury,
Notary Public in and for the County of Los Angeles, State of California. [36]

[Endorsed]: Filed September 1, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION TO STAY PROCEEDINGS

To the Plaintiff, Frank Ross, and to his attorneys, Pacht, Ross, Warne & Bernhard:

Please take notice that on the 21st day of November, 1955, at the hour of 10:00 a.m., or as soon thereafter as counsel may be heard in the court room of United States District Judge Thurmond Clarke, United States Post Office and Court House Building, 312 N. Spring Street, Los Angeles, California, defendant Twentieth Century-Fox Film Corporation will move the court for an order to stay proceedings in the above-entitled action on the ground that plaintiff's Complaint herein alleges a controversy arising out of that certain Agreement of Sale dated August 11, 1952, involving the proper allocation of costs and profits referrable to the production and distribution of the photoplay, "The Robe", and that said Agreement provides that unresolved controversies relating to such matters shall be referred to [37] arbitrators and resolved in the manner provided in Article XIX of said Agreement.

Said motion will be based upon Title 9 of the United States Code, plaintiff's Complaint, defendant's Answer and defendant's Memorandum of Points and Authorities in support of said motion.

Dated: October 20, 1955.

MUSICK, PEELER & GARRETT,
/s/ By HAROLD F. COLLINS,
Attorneys for Defendant Twentieth Century-Fox Film Corporation

Affidavit of Service by Mail attached. [39]

[Endorsed]: Filed October 20, 1955.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

This defendant, Twentieth Century-Fox Film Corporation, a Delaware corporation, for its answer to the complaint herein, admits, denies, alleges and moves as follows:

I.

Referring to paragraphs I and II thereof, defendant denies each allegation made therein except as otherwise admitted hereinafter. Defendant admits that plaintiff Frank Ross is a citizen of the State of California, but denies that he brings this action in behalf of the assignees of 8% of the interests in the proceeds of said written Agreement of Sale dated August 11, 1952, and denies that said assignees have the requisite diversity of citizenship or monetary interest in the claim and cause of action set forth in said complaint to invest this court with jurisdiction thereof. Defendant alleges that Twentieth Century-Fox Film Corporation, a

New York corporation, was a party to said [40] written Agreement of Sale dated August 11, 1952; that on or about September 27, 1952, said Twentieth Century-Fox Film Corporation, a New York Corporation, transferred its rights and obligations in and derivative under said Agreement of Sale, to this defendant, Twentieth Century-Fox Film Corporation, a Delaware corporation; that at all times subsequent to September 27, 1952, this defendant, Twentieth Century-Fox Film Corporation, a Delaware corporation, has been authorized to conduct business in the State of California and in the Southern District of California.

The admissions, denials and allegations hereinafter directed to conduct imputed to "defendant Fox" in said complaint shall as to all conduct and events occurring subsequent to September 27, 1952, refer to this defendant, and as to all conduct and events which occurred prior to said date, shall refer to Twentieth Century-Fox Film Corporation, a New York corporation, later known as TCF Film Corporation, a New York corporation.

II.

Referring to paragraph III thereof and to that certain written Agreement of Sale dated August 11, 1952, which is identified as Exhibit A attached to said complaint, and to that certain written "Supplemental Agreement" dated August 13, 1952, which is identified as Exhibit B attached to said complaint, defendant admits the making thereof.

III.

Referring to paragraph IV thereof, defendant denies each allegation made therein and in connection therewith alleges that Pictures, Productions and their respective assignees, including plaintiff, have failed to perform the conditions of said Agreement of Sale, to wit, the provisions therein for the giving of notice as to any claimed inaccuracies in the statement of negative cost, distribution cost and net profits referrable to the production and distribution of the photoplay, "The Robe", and the provision that in the [41] event questions and controversies relating to said matters are not settled by agreement of the parties, such matters shall be referred to arbitrators and resolved in the manner described in Article XIX of said Agreement of Sale, copy of which is attached as Exhibit A to the complaint, and which by this reference is adopted and impleaded hereat.

IV.

Referring to paragraph V thereof, defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the several allegations made therein, except defendant admits that on or about February 19, 1953, Pictures filed a "Certificate of Winding Up and Dissolution" with the Secretary of State of the State of California.

V.

Referring to paragraph VI thereof, defendant denies each allegation made therein, except defendant admits that on or about December 5, 1953, de-

fendant delivered to plaintiff an incomplete statement of negative cost, and admits that on or about September 22, 1954, defendant delivered to plaintiff a final statement of negative cost covering the production of said photoplay, "The Robe", and that said final statement of negative cost was delivered within 90 days following the completion of the negative of said photoplay, as contemplated by the parties.

Defendant alleges that Pictures and plaintiff have failed and neglected to avail themselves of the right reserved to them in subsection (h) of Article XIX of said Agreement of Sale dated August 11, 1952, namely, to audit defendant's books and records for the purpose of verifying the correctness of defendant's statement covering the negative cost of said photoplay, "The Robe", either within 90 days subsequent to December 5, 1953, or within 90 days subsequent to September 22, 1954, or within the time period upon which the parties mutually agreed that said audit might be commenced, as set forth in a letter agreement between them, dated July 29, 1954, which extended [42] said time period to December 31, 1954; that by reason of said failure on the part of Pictures and plaintiff to commence any audit of defendant's books and records, defendant's said statement of negative cost is, by the express terms of subsection (h) of Article XIX of said Agreement of Sale, conclusively presumed to be correct; that by reason of said provisions of said Agreement of Sale and said foregoing facts, plaintiff is now estopped from asserting the existence of any con-

troversy with respect to said matters and is further estopped from asserting any rights against, demands or claims upon defendant by reason of said matters, either in this action or in any arbitration proceeding provided for in said Agreement of Sale in the event of any controversy respecting said matters.

VI.

Referring to paragraph VII thereof, defendant denies each allegation made therein, except it admits that the statement of negative cost furnished on or about September 22, 1954, reflects a total negative cost for purposes of profit-participation computation in the amount of $3,837,785.98.

VII.

Referring to paragraph VIII thereof, defendant denies each allegation made therein, except it admits that said Agreement of Sale dated August 11, 1952, and said agreement between Fox and RKO Radio Pictures, Inc., dated August 11, 1952, contained the definitions, provisions and language set forth in said paragraph.

VIII.

Referring to paragraph IX thereof, defendant denies each allegation therein, except it admits that up to and including March 26, 1955, it charged to the production and distribution of the photoplay, "The Robe", various items and charges as more

particularly set forth in said tentative report as of said date. [43]

IX.

Referring to paragraph X thereof, defendant denies each allegation made therein.

For its affirmative defenses to said complaint, defendant states, alleges and moves as follows:

First Affirmative Defense

Defendant alleges that the complaint herein fails to state a claim upon which relief can be granted.

Second Affirmative Defense

Defendant alleges that this court lacks jurisdiction over the subject matter pleaded in said complaint.

Third Affirmative Defense

Defendant alleges that this court lacks jurisdiction over the person of defendant in that defendant is informed and believes that there does not exist the requisite diversity of citizenship between defendant and one or more of the assignees and holders of fractional portions of the 8% interest in the assets of F. R. Pictures, Inc., collectively referred to in paragraph II of said complaint, and whose names, defendant is informed and believes, are as follows: Richard C. Ross, Harry Berman, Charles Miller, Maurie Lipsey, David Werblin, Taft Schreiber, Karl Kramer, Lawrence Barnett, Lew Wasserman, and Management Corporation of America, (a Delaware corporation).

Fourth Affirmative Defense

Defendant alleges that the complaint fails to join as parties plaintiff certain indispensable parties, to wit, the assignees of fractional portions amounting to a total of 8% interest in said Agreement of Sale dated August 11, 1952, which assignees are collectively referred to in paragraph II of said complaint, and whose names, defendant is informed and believes, are as follows: Richard C. Ross, Harry Berman, Charles Miller, Maurie Lipsey, David Werblin, Taft Schreiber, Karl Kramer, Lawrence Barnett, [44] Lew Wasserman, and Management Corporation of America (a Delaware corporation).

Fifth Affirmative Defense

Defendant alleges that, as clearly appears in said complaint, plaintiff challenges the accuracy of the statement of negative cost, the reports of distribution costs and numerous charges made by defendant referrable to the production and distribution of the photoplay, "The Robe"; that by reason thereof there has arisen a controversy between plaintiff and defendant with respect to said matters; that said Agreement of Sale dated August 11, 1952, copy of which is attached to plaintiff's complaint as Exhibit A thereof, and which by this reference is adopted and impleaded hereat, specifically provides in paragraph XIX thereof that in case of any such controversy the questions in controversy shall be submitted for determination to certified public accountants in the City of New York acceptable to the

parties, and that in the event the parties fail to agree upon such firm of accountants, then said controversy shall be submitted for determination to such national firm of accountants in New York City as shall be designated by the American Arbitration Association in that city; that neither plaintiff nor his predecessors in interest nor any of his co-assignees has ever demanded or requested or notified defendant to proceed with said arbitration; that defendant is ready and willing to proceed to arbitrate the correctness of its distribution charges and other matters now properly subject to arbitration within the purview of said Agreement of Sale; and in the event an agreement cannot be reached as to an acceptable firm of accountants, defendant is agreeable that designation of said arbiter be made by the American Arbitration Association at New York, as provided in said Article XIX of said agreement; that by reason of said agreement and the foregoing facts and proposals, further proceedings in this action should be stayed by order of this court, and defendant moves for the entry of such an order. [45]

Wherefore, defendant prays that plaintiff take nothing by reason of his complaint herein and that defendant have judgment for its costs herein. Alternatively, defendant moves that said action be dismissed, or that all proceedings herein be stayed in order that the arbitrable issues presented may be

resolved by arbitration in accordance with the Agreement of Sale dated August 11, 1952.

MUSICK, PEELER & GARRETT,

/s/ By HAROLD F. COLLINS,

Attorneys for Defendant Twentieth Century-Fox Film Corporation

Affidavit of Service by Mail attached. [47]

[Endorsed]: Filed October 20, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF STUART L. KADISON IN OPPOSITION TO MOTION TO STAY PROCEEDINGS

State of California,
County of Los Angeles—ss.

Stuart L. Kadison, being first duly sworn, deposes and says:

I am an attorney at law, admitted to practice in the above entitled court, and am a member of the firm of Pacht, Ross, Warne & Bernhard, attorneys for plaintiff herein.

I have read and analyzed the moving papers of the defendant in support of its application for a stay of proceedings pending arbitration. Said application would appear to be based upon Title 9 U.S.C. Section 3, which said section provides for a

stay of proceedings under certain circumstances not here present as developed in the Memorandum of Points and Authorities in opposition to the motion to stay. The purpose of this affidavit is to demonstrate that even were this a proper action for a stay under the cited section, [48] nonetheless, a stay would not be available to the defendant by reason of its default in proceeding with the arbitration.

More particularly, on August 30, 1955 the plaintiff, through his attorneys, addressed a demand to the moving party wherein the provisions of paragraph XIX (h) 3 of the agreement here in issue were invoked, said demand consisting of a specification of issues to be submitted to the "arbitrators" as provided in said agreement. There is annexed hereto, marked Exhibit A, a true and correct copy of said demand.

Thereafter, on August 31, 1955, and prior to the commencement of this action, affiant received from the moving defendant a letter, which said letter did not constitute a reply to said demand. A true and correct copy of said letter of August 31, 1955, is annexed hereto and marked Exhibit B and specifically made a part hereof. Neither plaintiff nor affiant has had, as of the date of this affidavit, any reply to the "Demand for Arbitration", Exhibit A hereto.

By reason of the failure of the moving defendant to reply to said demand, said defendant is in default in proceeding with arbitration and by that reason not entitled, as a matter of law, to invoke

the provisions of Title 9 U.S.C. Section 3, were it otherwise applicable.

/s/ STUART L. KADISON

Subscribed and sworn to before me this 16th day of November, 1955.

[Seal] /s/ ANNA TAYLOR,
Notary Public in and for said
County and State [49]

EXHIBIT A

August 30, 1955

Twentieth Century-Fox Film Corp.
P. O. Box 900, Beverly Hills, California

Dear Sirs:

This notice is given you on behalf of our client, Frank Ross, successor in interest to F. R. Pictures, Inc., a dissolved California corporation, in and under that certain agreement of sale made and entered into between F. R. Pictures, Inc. and Frank Ross Productions, Ltd. on the one hand, and Twentieth Century-Fox Film Corporation, a New York Corporation, on the other.

Your attention is specifically invited to paragraph XIX (h) 3 of said agreement of sale. A controversy has arisen between our client and you as to the accountings for net profits of the Picture referred to in said paragraph of said agreement.

More particularly, our client questions and takes exception to the accounting procedures employed

by you in detemining net profits of said Picture in the following respects:

1. Mexican sales taxes have been charged against net receipts, although they are levied on gross receipts. 30% of said sales tax should be borne by the distributor.

2. Cuban sales taxes have been charged against net receipts, although they are levied on gross receipts. 30% of said sales tax should be borne by the distributor.

3. Revenues derived from the countries of [50] Brazil, Norway, Italy, The Phillipine Islands, France, Australia and Germany have been converted to United States dollars at excessively low rates of exchange.

4. Other matters to be included in the submission to the Arbitrator.

In accordance with paragraph XIX (h) 3 of said agreement, we request that you meet with us in order to select a Certified Public Accountant in the City of New York, acceptable to both parties. At the same time, we can perhaps arrive at a joint statement of the questions in controversy for submission to said Arbitrator.

Very truly yours,

PACHT, ROSS, WARNE & BERNHARD,

/s/ By N. JOSEPH ROSS

/s/ STUART L. KADISON,

Attorneys for Frank Ross [51]

EXHIBIT B

Twentieth Century-Fox Film Corporation
Beverly Hills, California

Legal Department August 31, 1955

Pacht, Ross, Warne & Bernhard
6535 Wilshire Boulevard,
Los Angeles 48, California

Attn: Mr. N. Joseph Ross and Mr. Stuart L. Kadison. Re: Frank L. Ross.

Gentlemen:

On previous occasions we have advised you that questions relative to the ascertaining and distribution of net profits from our motion picture "The Robe" are matters strictly within the province of our New York Office. We are therefore forwarding your letter of August 30, 1955 to New York and suggest that you pursue this matter by writing either to Mr. C. E. McCartney, Comptroller of Twentieth Century-Fox Film Corporation or to Mr. Harry J. McIntyre of the New York Legal Department.

It is not our desire to be uncooperative in this matter, but we do not have any of the books or records involved at our disposal here at the studio.

Yours very truly,

TWENTIETH CENTURY-FOX
FILM CORPORATION,

/s/ By FRANK H. FERGUSON,
Resident Counsel

FHF:ms—cc: Mr. H. J. McIntyre [52]

Affidavit of Service by Mail attached. [53]

[Endorsed]: Filed November 17, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF FRANK H. FERGUSON IN SUPPORT OF MOTION TO STAY PROCEEDINGS

State of California,
County of Los Angeles—ss.

Frank H. Ferguson, being first duly sworn, deposes and states:

I am an attorney at law admitted to practice my profession in the above-entitled court and in all courts of the State of California. For the past several years I have been and now am Resident Counsel for Twentieth Century-Fox Film Corporation, with headquarters at its studio at Los Angeles, California.

I have read the Affidavit of Stuart L. Kadison, dated November 16, 1955, as served and filed herein.

On August 31, 1955, I received a letter dated August 30, 1955, directed to Twentieth Century-Fox Film Corporation by Pacht, Ross, Warne &

Bernhard, by N. Joseph Ross and Stuart L. Kadison as attorneys for Frank Ross, a copy of which letter is attached as Exhibit A to said Affidavit of Stuart L. Kadison; on August 31, 1955, [54] I dictated and dispatched a reply letter to said attorneys, a true copy of which letter is attached as Exhibit B to said Affidavit of Stuart L. Kadison.

Also, on August 31, 1955, following receipt of said letter dated August 30, 1955, I promptly caused a copy thereof to be prepared and dispatched by air mail to Harry J. McIntyre, an attorney whose office is in the Legal Department maintained at the principal offices of Twentieth Century-Fox Film Corporation at 444 West 56th Street, New York, New York. On September 2, 1955, while awaiting advice from said Harry J. McIntyre in New York, I learned through reading a news item published that date in Los Angeles daily newspapers (and also in New York newspapers) that on September 1, 1955, Frank Ross had filed an action in the above-entitled court against Twentieth Century-Fox Film Corporation claiming that excessive overhead and other improper items had been charged to the production and distribution of the photoplay "The Robe". Upon so learning that Frank Ross and his said attorneys had elected not to wait a reasonable period or any period of time for a response to their request for a meeting to select an acceptable arbitrator and to arrive at a joint statement of matter to be submitted to such arbitrator, as set out in their said letter dated August 30, 1955, I arranged on September 6, 1955, to consult Harold F. Collins, an attorney at

law and member of the law firm of Musick, Peeler & Garrett, respecting said matter; said date was the first opportunity to do so in view of the fact that Saturday, September 3, and Sunday, September 4, were business holidays, and Monday, September 5, Labor Day, was a national holiday. Promptly thereafter, to wit, on September 7, 1955, said Harold F. Collins, as Statutory Agent for Twentieth Century-Fox Film Corporation, reported he had been served with a copy of the Summons and Complaint herein; thereupon Musick, Peeler & Garrett and said Harold F. Collins, as trial attorneys for said Corporation, were authorized to prepare and file in its behalf such pleadings as [55] would present the matter of arbitration and an application for Stay of Proceedings in the above-entitled action in accordance with appropriate court procedures; on October 20, 1955, an Answer to plaintiff's Complaint was served and filed herein, together with a Notice of Motion to Stay Proceedings in this court, pending arbitration as provided in Article XIX of the Agreement of Sale which is attached as Exhibit A to plaintiff's Complaint herein. Affiant states that the hasty action on the part of plaintiff and his attorneys in commencing the present lawsuit one day after requesting arbitration and before defendant had a reasonable or any opportunity to respond thereto precluded any form of response except as presented in defendant's Answer and pending Motion for Stay of Proceedings herein; and that plaintiff is in no position to assert in good faith, or at all, that "defendant is in default in proceeding with arbitra-

tion * * *" as claimed in said Affidavit of Stuart L. Kadison.

/s/ FRANK H. FERGUSON

Subscribed and sworn to before me this 23rd day of November, 1955.

[Seal] /s/ MANYA SHARFF BECHTOLD
Notary Public in and for said
County and State aforesaid

Affidavit of Service by Mail attached. [57]

[Endorsed]: Filed November 23, 1955.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Nov. 28, 1955, at Los Angeles, Calif.

Present: Hon. Thurmond Clarke, District Judge; Deputy Clerk: Ed. J. Fisher; Reporter: John Swader; counsel for Plaintiff: S. L. Kadison; counsel for Defendant: Harold F. Collins.

Proceedings: For hearing defendant's motion to dismiss, or to stay proceedings.

Attorney Kadison argues to the Court.

Attorney Collins argues to the Court.

Court Orders cause as to said motion to dismiss taken under submission.

JOHN A. CHILDRESS,
Clerk [58]

In the United States District Court for the Southern District of California, Central Division

No. 18714-TC—Civil

FRANK ROSS, Plaintiff,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, Defendant.

MINUTES OF THE COURT

Date: Nov. 29, 1955, at Los Angeles, Calif.

Present: Hon. Thurmond Clarke, District Judge; Deputy Clerk: Ed. J. Fisher; Reporter: None; Counsel for Plaintiff: No appearance; Counsel for Defendant: No appearance.

Proceedings: Ruling on submitted matter.

The Court has this day granted the Defendant's Motion to Stay Proceedings, heretofor heard on Nov. 28, 1955.

Counsel notified.

JOHN A. CHILDRESS,
Clerk [59]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Frank Ross, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the order entered November 29, 1955, staying the above entitled cause.

Dated: December 7, 1955.

PACHT, ROSS, WARNE & BERNHARD,

/s/ By STUART L. KADISON,

Attorneys for Appellant, Frank Ross [60]

Affidavit of Service by Mail attached. [61]

[Endorsed]: Filed December 8, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 64, inclusive, contain the original

Complaint;

Notice of Motion to Stay Proceedings;

Answer to Complaint;

Affidavit of Stuart L. Kadison;

Affidavit of Frank H. Ferguson;

Notice of Appeal;

Designation of Record on Appeal; and a full, true and correct copy of the Minutes of the Court for November 28, 29, 1955; in the above-entitled cause constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said cause.

I further certify that my fees for preparing the foregoing record amount to $2.00, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 13th day of January, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk

/s/ By CHARLES E. JONES,
Deputy Clerk

[Endorsed]: No. 14999. United States Court of Appeals for the Ninth Circuit. Frank Ross, Appellant, vs. Twentieth Century-Fox Film Corporation, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: January 16, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14999

FRANK ROSS, Appellant,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, a New York corporation, JOHN DOES I through XX and DOES CORPORATIONS I through X, Appellees.

APPELLANT'S STATEMENT OF POINTS AND DESIGNATION OF RECORD

To the Clerk of Said Court:

The following is a statement upon which appellant intends to rely on the appeal herein.

1. The Court erred in rendering and making the Order herein appealed from, which stayed and abated further proceedings in said action.

2. The Court erred, as a matter of law, in concluding and holding that the contract sued upon in said action and the basis of plaintiff's Complaint, required an arbitration of the dispute upon which the claim of plaintiff is based, and for that reason further prosecution of said action was and is barred.

3. The Court erred, as a matter of law, in concluding and holding that the contract sued upon and the basis of plaintiff's claim was a contract in interstate commerce and subject to an Order staying

further proceedings in said action upon said grounds.

4. The Court erred, as a matter of law, in concluding and holding that the issues presented by the plaintiff's Complaint are, or could be construed to be, within the arbitration clause and language in said contract.

5. The Court erred, as a matter of law, in concluding and holding that the defendant was not in default for failure to proceed by way of arbitration to settle and determine the dispute between said parties, and that such default bars defendants' right to a stay of plaintiff's further prosecution of said action.

Designation of Record

Appellant designates for printing in the Record on Appeal the complete records and exhibits certified to this Court by the Clerk of the District Court.

Dated: January 20, 1956.

PACHT, ROSS, WARNE & BERNHARD,

/s/ By CLORE WARNE,

Attorneys for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 21, 1956. Paul P. O'Brien, Clerk.

No. 14999

United States
Court of Appeals
for the Ninth Circuit

FRANK ROSS,

Appellant,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, et al.,

Appellees.

Supplemental
Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

FILED

JUN -5 1956

PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—6-1-56

No. 14999

United States
Court of Appeals
for the Ninth Circuit

FRANK ROSS,

Appellant,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, et al.,

Appellees.

Supplemental
Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—6-1-56

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

PACHT, ROSS, WARNE & BERNHARD,
6535 Wilshire Boulevard,
Los Angeles 48, California.

For Appellee:

MUSICK, PEELER & GARRETT,
621 South Hope Street,
Los Angeles 17, California.

United States District Court for the Southern District of California, Central Division

No. 18714-TC

FRANK ROSS,

Plaintiff,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, et al.,

Defendants.

ORDER STAYING PROCEEDINGS

This matter came regularly on to be heard upon the motion of the defendant Twentieth Century-Fox Film Corporation to stay proceedings in said action, plaintiff appearing by Pacht, Ross, Warne & Bernhard and Stuart L. Kadison, Esq., his attorneys, and said defendant appearing by Musick, Peeler & Garrett and Harold F. Collins, its attorneys, and the Court having considered said motion and being satisfied that the issues involved in said suit are referable to arbitration under an agreement in writing dated August 11, 1952, and having directed that a Minute Order be entered granting said motion, and good cause appearing therefor,

Now, Therefore, It Is Ordered that the trial of said action and further proceedings herein shall be stayed until arbitration has been had in accordance with the terms of said agreement of August 11,

1952, copy of which is attached to plaintiff's Complaint as Exhibit "A" thereof, and the Clerk is directed that this order and judgment be duly entered in the manner required by the rules of this court.

Dated this 5th day of April, 1956.

/s/ THURMOND CLARKE,
Judge.

Approved as to Form:

April 5th, 1956.

MUSICK, PEELER &
GARRETT,

By /s/ HAROLD F. COLLINS,
Attorneys for Defendant, Twentieth Century-Fox Film Corporation.

[Endorsed]: Filed April 5, 1956.

Docketed and entered April 11, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Frank Ross, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that certain Order Staying Proceedings heretofore made by the said Court under date of April 5, 1956, and entered, docketed and filed on the 11th

day of April, 1956, and from the whole of said order.

Dated: April 12, 1956.

PACHT, ROSS, WARNE & BERNHARD,

By /s/ STUART L. KADISON,
Attorneys for Plaintiff and Appellant Frank Ross.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 17, 1956.

[Title of District Court and Cause.]

STIPULATION RE SUPPLEMENTAL RECORD AND CONSOLIDATION OF RECORD ON APPEAL AND FOR SUBMISSION OF CAUSE

Plaintiff, Frank Ross, and the defendant Twentieth Century-Fox Film Corporation, through their respective attorneys stipulate and agree relative to the following facts and circumstances:

A. Heretofore and prior to the 5th day of April, 1956, certain proceedings were taken and had in the above-entitled cause, resulting in the entry of a minute order under date of November 29, 1955, by the order and direction of Honorable Thurmond Clarke, District Judge, which said order granted the motion of said defendant theretofore made to

stay proceedings in said action. Thereafter plaintiff served notice of appeal from said order to the United States Court of Appeals for the Ninth Circuit, and prepared and filed in the office of the Clerk of said Court of Appeal Appellant's Statement of Points and Designation of Record. That a record of all of said proceedings is specifically set forth in the printed Transcript of Record, pages 1 to 70, inclusive thereof, heretofore prepared and filed in the office of the Clerk of said Court in the appeal so taken and which is there pending, entitled "Frank Ross, Appellant, vs. Twentieth Century-Fox Film Corporation, a Corporation, Appellee," No. 14999, Records and Files of said Court.

B. Thereafter Appellant served and filed in the office of the Clerk of said Court of Appeal Appellant's opening brief and thereafter Appellee served and filed its Appellee's brief, and Appellant represents that he will cause to be filed Appellant's repy brief within time provided by the rules of said Court.

C. Thereafter, and under date of April 5, 1956, a written order staying proceedings in said cause was signed by the Honorable Thurmond Clarke, District Judge, which order has been entered, docketed and filed at the direction of said Court by the Clerk thereof, on the 11th day of April, 1956.

D. Thereafter and on the 17th day of April, 1956, plaintiff filed his Notice of Appeal to the said United States Court of Appeals for the Ninth Circuit from said formal order so made and entered.

The parties hereto stipulate and agree as follows:

1) That a supplemental transcript of record may be made and filed in the office of the Clerk of said Court of Appeal in form as directed by the Clerk thereof, which shall contain and set forth the said order staying proceedings made and entered as herein set forth, the notice of appeal therefrom and this stipulation, all under proper certificate of the Clerk of said District Court in accordance with the rules on appeal made and provided, and stipulate and agree further that said Supplemental Transcript of Record may be filed in and be given the same number and style designation as contained and set forth in original Transcript of Record filed therein.

2) That the said appeal as shown from said original Transcript of Record and the appeal as set forth in said Supplemental Transcript of Record may be consolidated, considered and determined by said Court of Appeal upon the said Appellant's opening brief and Respondent's brief, and Appellant's reply brief filed in said appeal proceedings.

Dated: April 18th, 1956.

PACHT, ROSS, WARNE & BERNHARD,

By /s/ CLORE WARNE,

Attorneys for Plaintiff and Appellant.

MUSICK, PEELER &
GARRETT,

By /s/ HAROLD F. COLLINS,
Attorneys for Defendent and Appellee Twentieth Century-Fox Film Corporation.

Order

It is so ordered:

Dated: April 19, 1956.

/s/ THURMOND CLARKE,
Judge.

[Endorsed]: Filed April 19, 1956.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 10, inclusive, contain the original

Order Staying Proceedings;
Notice of Appeal;
Stipulation re Supplemental Record and Consolidation of Record on Appeal and for Submission of Cause;
Appellant's Designation of Record to Be Included in Supplemental Transcript of Record;

all in above-entitled cause and constitute the transcript of record on appeal to the United States

Court of Appeals for the Ninth Circuit, in the above case.

I further certify that my fees for preparing the foregoing record amount to $2.00, which sum has been paid by appellant.

Witness my hand and the seal of the said District Court this 10th day of May, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 14999. United States Court of Appeals for the Ninth Circuit. Frank Ross, Appellant, vs. Twentieth Century-Fox Film Corporation, et al., Appellees. Supplemental Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed May 11, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 14999.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK ROSS,

Appellant,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

PACHT, ROSS, WARNE & BERNHARD,
By ISAAC PACHT,
STUART L. KADISON,
6535 Wilshire Boulevard,
Los Angeles 48, California,
Attorneys for Appellant.

FILED
MAR - 3 1956
PAUL P. O'BRIEN, CLERK

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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No. 14999.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK ROSS,

Appellant,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Jurisdiction.

The jurisdiction of the Court of Appeals to review the Order of the District Court herein is conferred by Title 28, U. S. Code, §1292(1).

The Complaint herein for breach of contract was filed by appellant in the United States District Court for the Southern District of California, Central Division, on September 1, 1955 [Tr. pp. 3-47].* The Answer thereto was filed by appellee on October 20, 1955 [Tr. pp. 49-57]. It affirmatively appears from the Complaint herein that plaintiff, Frank Ross, is a citizen of the State of California [Tr. p. 3] and that defendant, Twentieth Century-Fox

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*Whenever reference is made to the Transcript of Record, the legend "Tr." followed by appropriate page number will be employed.

Film Corporation is a corporation organized under and pursuant to the laws of the State of New York and therefore a citizen of that State [Tr. p. 4]. The amount in controversy herein, exclusive of interest and costs, exceeds the sum of $3,000.00 [Tr. p. 3]. Jurisdiction of the United States District Court was conferred by Title 28, U. S. Code, §1332(a)(1).

The Order of the District Court from which this appeal is taken [Tr. p. 66] was entered on November 29, 1955. Said Order constitutes an order staying the trial of the action herein on the application of appellee pursuant to Title 9, U. S. Code, §3. Such Order in an action at law as for breach of contract has been held to be in effect an interlocutory order granting an injunction and is appealable by reason of the provisions of Title 28, U. S. Code, §1292(1).*

Appellant served and filed his Notice of Appeal therefrom on December 8, 1955 [Tr. p. 67].

Statement of the Case.

The questions involved in this appeal and the manner in which they are raised are the following:

On August 11, 1952, appellant's predecessor in interest sold to defendant Twentieth Century-Fox Film Corporation (sometimes hereinafter referred to as "Fox") by written agreement of sale [Tr. pp. 17-43], certain rights, therein more particularly described, in and to a projected motion picture entitled "The Robe." Under the terms of the agreement of August 11, 1952, appellant, as successor in interest to the parties therein described as "Sellers," was

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**Baltimore Contractors, Inc. v. Bodinger,* 348 U. S. 176 (1955).

to receive as consideration for the sale a sum based upon a percentage of the net profit, as defined in the agreement, of the motion picture photoplay.

Under the terms of paragraph XIX(h)(3) of the agreement of sale [Tr. pp. 38-39] any controversy arising between the parties to the agreement "as to any accounting" was required to be submitted to certified public accountants in the City of New York, whose decision was to be final and binding upon the parties.*

The agreement of sale provided mechanics for ascertaining net profit as to which appellee's percentage interest was to attach [Tr. pp. 31-35]. Said mechanics are spelled out in detail in the Complaint [Tr. pp. 10-13] and may be epitomized as follows: Net profits were defined as the amount remaining after there should have been deducted from the "gross receipts" of the photoplay, the "distribution fees" of Fox, the "distribution expenses" of Fox, and the "negative cost" of the photoplay. Each of the quoted terms hereinabove enumerated was itself defined with par-

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*"3. In case any controversy shall arise between the parties hereto *as to any accounting* by Purchaser with respect to the share of Pictures in the net profits of the Picture, the questions in controversy shall be submitted for arbitration to certified public accountants in the City of New York, acceptable to the parties hereto, and in the event of the failure of the parties to agree upon such firm of accountants, then said controversy shall be submitted for determination to such national firm of accountants in New York City as shall be designated by the American Arbitration Association in that city. Each party shall be given a reasonable opportunity, under all circumstances, to submit its views to an arbitrator, and a copy of each communication sent by either party to the arbitrator shall be sent to the other party. The arbitrator may also secure advice and information independently. The decision of the arbitrator shall be final and binding upon the parties hereto. The costs of any arbitration, pursuant to this Article, shall be divided between the parties in such manner as shall be determined by the arbitrator." (Emphasis added.)

ticularity in the agreement and in the Complaint [Tr. *loc. cit.*].

In the Complaint, appellant asserted that overhead charges to negative cost of the photoplay were to be computed in the same manner as the same would have been computed had the photoplay been produced by Universal Pictures Corporation, and that under no circumstances were overhead charges to exceed 25% of direct charges. In that connection, the Court's attention is invited to paragraph XIX(c) of the Agreement of Sale [Tr. p. 32].

In his Complaint, appellant asserted that overhead charges represented 51.695% of the direct costs of the motion picture, after adjustments, and that an institutional expense of $5,000 for a Cinemascope lens had been included as part of the negative cost.

In addition, appellant asserted that appellee had charged as expenses of distribution, the cost of the development and exploitation of appellee's Cinemascope process, a cinematographic innovation developed by appellee. Appellant took the position that the expenses of appellee in the exploitation of its new process were not properly chargeable as expenses of distribution of this particular photoplay, and that the inclusion of such expenses which appellant believes, and hopes to prove, to be institutional expenses, as a portion of the distribution expense of "The Robe," is a breach of the agreement of August 11, 1952. *Appellant did not and does not question the amount of such charges or the accounting procedures followed by appellee in making them.* Appellant's case on the merits involves the pure legal question of whether the agreement, as drawn, contemplates that appellant shall bear such charges.

The Court's attention is respectfully invited to the Complaint and to the Agreement of Sale for the particulariza-

tion of appellant's contentions hereinabove epitomized in compliance with Rules of the United States Court of Appeals, Ninth Circuit, 18(c).

On October 20, 1955, appellee filed its Answer to the Complaint [Tr. pp. 49-57], as well as its Notice of Motion to stay proceedings [Tr. p. 48]. The motion was placed on the calendar for hearing on November 21, 1955, adjourned on the Court's motion to November 28, 1955, and heard on said latter date. Thereafter, on November 29, 1955, an Order was entered granting said motion to stay proceedings [Tr. p. 66], and appellant appealed from said order.

Specification of Errors.

It is respectfully submitted that the court below erred in the following specified particulars:

1. In making and entering the Order herein appealed from which stays proceedings in this action.

2. In determining that the Agreement of Sale of August 11, 1952, is an agreement for arbitration.

3. In determining that the Agreement of Sale of August 11, 1952, is an agreement involving commerce within the meaning and scope of Title 9, U. S. Code.

4. In determining that all or any of the issues in this action are referable to the agreement for arbitration, assuming, *arguendo,* that the agreement of August 11, 1952, is an agreement for arbitration within the meaning of Title 9, U. S. Code.

5. In determining that appellee was not in default in proceeding with arbitration, and therefore not disenabled to raise the provisions of Title 9, U. S. Code, §3.

Summary of Argument.

The effect of the Order below is to impose upon parties to an agreement a provision for arbitration to which they did not agree, and to construe an act of Congress, limited by its terms to the regulation of maritime contracts and contracts involving interstate commerce to extend to a wholly intrastate transaction. Further, it requires the submission to certified public accountants of issues of law which the parties did not intend should be resolved by extrajudicial determination, at the instance of a party which is itself in default in proceeding with arbitration.

I.

Title 9, U. S. Code, Has Application Only to Contracts Reflecting Maritime Transactions or Evidencing Transactions Involving Interstate Commerce. The Agreement in Suit Is Neither a Contract Reflecting a Maritime Transaction nor Evidencing a Transaction Involving Interstate Commerce.

II.

Whether or Not the Contract Here in Suit Is a Contract for Arbitration Is a Question of State Law. The Applicable State Law Is That of California. Under California Law the Contract Is Not an Agreement for Arbitration.

III.

None of the Issues in This Action Are Referable to Arbitration Under the Agreement.

IV.

Appellee Is in Default in Proceeding With Arbitration, and Therefore Disenabled to Raise the Provisions of Title 9, U. S. Code, §3.

ARGUMENT.

I.

Title 9, U. S. Code, Has Application Only to Contracts Reflecting Maritime Transactions or Evidencing Transactions Involving Interstate Commerce. The Agreement in Suit Is Neither a Contract Reflecting a Maritime Transaction nor Evidencing a Transaction Involving Interstate Commerce.

It was at one time argued that while Title 9, U. S. Code, §2, made enforceable arbitration agreements in maritime transactions and in transactions involving commerce, that Title 9, U. S. Code, §3, empowered the United States District Courts to stay proceedings where any agreement for arbitration was involved, even though the agreement did not relate to a maritime transaction or a transaction in interstate commerce. In recent years this contention has been consistently rejected by the courts and has finally been laid to rest by the Supreme Court of the United States.

Bernhardt v. Polygraphic Co. of America, Inc., ... U. S. ....., 76 S. Ct. 273 (Jan. 16, 1956).

See, also:

Tejas Development Co. v. McGough Bros., et al., 165 F. 2d 276, 278-279 (5 Cir., 1948);

Tenney Engineering, Inc. v. United Electrical R. & M. Workers, 207 F. 2d 450, 454 (3 Cir., 1953) [dictum contained in footnote];

Sturgis, "Arbitration Under the United States Arbitration Act," 17 Law & Contemporary Problems, 580, 600-604 (1952).

The recent decision of the Supreme Court of the United States in *Bernhardt v. Polygraphic Company of America, Inc., supra,* would appear finally to dispose of the contention hereinabove set forth. In that case, which had been removed to the United States District Court by reason of diversity of citizenship, the contract whereunder the plaintiff was employed as the superintendent of defendant New York corporation's lithograph plant in Vermont contained a true arbitration clause. Vermont law makes revocable an agreement to arbitrate at any time before an award is actually made. The defendant attempted to invoke Title 9, U. S. Code, §3. The motion was denied by the United States District Court. The Court of Appeals reversed (218 F. 2d 1948). The case came to the Supreme Court of the United States on petition for certiorari which was granted because of the doubtful application by the Court of Appeals of *Erie R. Co. v. Tompkins,* 304 U. S. 64.

The Court, Mr. Justice Douglas, held that no maritime transaction was involved, nor did the contract evidence "a transaction involving commerce" within the meaning of Section 2 of the United States Arbitration Act. It held further that the conclusion of the Court of Appeals that Section 3 of the Act stands on its own footing was erroneous, stating (76 S. Ct. at pp. 275-276):

> ". . . We disagree with that reading of the Act. Sections 1, 2, and 3 are integral parts of a whole. To be sure, §3 does not repeat the words 'maritime transaction' or 'transaction involving commerce,' used in §§1 and 2. But §§1 and 2 define the field in which Congress was legislating. Since §3 is a part of the regulatory scheme we can only assume that the 'agreement in writing' for arbitration referred to §3 is the kind of agreement which §§1 and 2 have brought under federal regulation. There is no in-

timation or suggestion in the Committee Reports that §§1 and 2 cover a narrower field than §3. On the contrary, S. Rep. No. 536, 68th Cong., 1st Sess. p. 2, states that §1 defines the contracts to which 'the bill will be applicable.' And H. R. Rep. No. 96, 68th Cong., 1st Sess., p. 1, states that one foundation of the new regulating measure is 'the Federal control over interstate commerce and over admiralty.' If respondent's contention is correct, a constitutional question might be presented. *Erie R. Co. v. Tompkins* indicated that Congress does not have the constitutional authority to make the law that is applicable to controversies in diversity of citizenship cases. Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 293 U. S. 449, applied the Federal Act in a diversity case. But that decision antedated *Erie R. Co. v. Tompkins;* and the Court did not consider the larger question presented here—that is, whether arbitration touched on substantive rights, which *Erie R. Co. v. Tompkins* held were governed by local law, or was a mere form of procedure within the power of the federal courts or Congress to prescribe. Our view, as will be developed, is that §3, so read, would invade the local law field. We therefore read §3 narrowly to avoid that issue. *Federal Trade Commission v. American Tobacco Co.,* 264 U. S. 298, 307. We conclude that the stay provided in §3 reaches only those contracts covered by §§1 and 2."

Mr. Justice Douglas then went on to consider whether, apart from the United States Arbitration Act, a provision of a contract providing for arbitration is enforceable in a diversity case. He concluded that its enforceability depends upon the substantive law of the forum,

in accordance with the doctrine of *Erie R. Co. v. Tompkins, supra*. In that connection, the following was said (*supra*, 76 S. Ct. at pp. 276-277):

> "The Court of Appeals, in disagreeing with the District Court as to the effect of an arbitration agreement under *Erie R. Co. v. Tompkins,* followed its earlier decision of *Murray Oil Products Co. v. Mitsui & Co.*, 146 F. 2d 381, 383, which held that, 'Arbitration is merely a form of trial, to be adopted in the action itself, in place of the trial at common law: it is like a reference to a master, or an "advisory trial" under Federal Rules of Civil Procedure. . . .'
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> "We disagree with that conclusion. We deal here with a right to recover that owes its existence to one of the States, not to the United States. The federal court enforces the state-created right by rules of procedure which it has acquired from the Federal Government and which therefore are not identical with those of the state courts. Yet in spite of that difference in procedure, the federal court enforcing a state-created right in a diversity case is, as we said in *Guaranty Trust Co. v. York,* 326 U. S. 99, 108, in substance 'only another court of the State.' The federal court therefore may not 'substantively affect the enforcement of the right as given by the State.' *Id.*, 109. *If the federal court allows arbitration where the state court would disallow it, the outcome of litigation might depend on the courthouse where suit is brought. For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State.* The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference

in ultimate result. Arbitration carries no right to trial by jury that is guaranteed both by the Seventh Amendment and by Ch. 1 Art. 12th of the Vermont Constitution. Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a tiral-all as discussed in *Wilko v. Swan,* 346 U. S. 427, 435-438. We said in the York case that 'The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a state court a block away should not lead to a substantially different result.' 326 U. S. 109. There would in our judgment be a resultant discrimination if the parties suing on a Vermont cause of action in the federal court were remitted to arbitration, while those suing in the Vermont Court could not be." (Emphasis added.)

We believe it entirely clear, and respectfully submit, that the contract in suit involves neither a maritime contract nor interstate commerce and that the United States Arbitration Act, Title 9 U. S. C. is without application

The Agreement of Sale of August 11, 1952, is a contract made in California, to be performed in California. It is a simple agreement for the sale of personal property (*Herwig v. The United States,* 105 F. Supp. 384 (Ct. of Claims, 1952)), and in no sense involves interstate commerce.

The mere fact that an intrastate sale involves goods which originate in or may ultimately find their way into

interstate commerce does not render the sale itself a transaction in interstate commerce.

Spencer v. Sun Oil Co., 94 F. Supp. 408 (D. C., D. Conn., 1950);

Libby, McNeill & Libby v. Libby, 103 F. Supp. 968 (D. Mass., 1952);

R. P. Hazzard Co. v. Emerson's Shoes, 89 F. Supp. 211 (D. C., D. Mass., 1950);

C. S. Smith Metropolitan Market Co. v. Food & Grocery Bureau of Southern California, 33 F. Supp. 539 (D. C., S. D. Cal., 1939).

Spencer v. Sun Oil Co., 94 F. Supp. 408 (D. C., D. Conn., 1950), involved an antitrust action under the Robinson-Patman Act. It was held that sales of gasoline at retail did not involve interstate commerce, the court stating at page 411:

> "The question of whether the retail sales by the individual dealers to their customers constitutes interstate commerce involves other considerations. The moment the gasoline is delivered to the dealer's filling station, title thereto passes to him. As an independent merchant, he has complete control over the process of merchandising. He is in much the same position as a retail grocer, some of whose products are derived from outside the state; such a merchant is not engaged in interstate commerce because the moment the products reach his shelves 'they come to rest and cease to be "in the flow" of interstate commerce'. Smith Metropolitan Market Co. v. Food and Grocery Bureau of Southern California, D. C., 1939, 33 F. Supp. 539, 540; A. L. A. Schechter Poultry Corp. v. U. S., 1935, 295 U. S 495, 55 S Ct 837, 79 L Ed. 1570. The retail sales of gasoline are trans-

actions consummated locally, involving a commodity which had been previously siphoned-off from the current of commerce and brought to rest within the state. Mid-Continent Petroleum Corp. v. Keen, 8 Cir., 1946, 157 F. 2d 310. These transactions are intrastate in nature and not within the purview of the Robinson-Patman Act.

"The plaintiffs have suggested that the retail sales acquire the attributes of interstate commerce since many of the customers are transients who travel over state lines and commercial users who are engaged in interstate transportation businesses. They have not referred to any authority to support their argument and *it would seem that what would otherwise be a purely intrastate transaction cannot be transformed into a transaction in interstate commerce merely because the commodity sold is taken by the purchaser across state lines and used in another state.*" (Emphasis added.)

C. S. Smith Metropolitan Market Co. v. Food & Grocery Bureau of Southern California, 33 F. Supp. 539, D. C., S. D. Cal. (1939), was an antitrust action in which Judge Yankwich held that a retailer of food was not engaged in interstate commerce, stating at page 540:

"The plaintiff is a California corporation, engaged solely in the business of selling and distributing food, groceries and allied articles of merchandise at retail in various retail stores owned and maintained by it in the cities of Los Angeles, Long Beach, Lynwood and Compton, all in the County of Los Angeles, California.

"Assuming that some of the products on its shelves are imported from other states, the moment they reach its shelves, they come to rest and cease to be 'in

> the flow' of interstate commerce. Schechter Poultry Corp. v. United States, 1935, 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570, 97 A. L. R. 947; Southern Pac. Co. v. Gallagher, 1938, 306 U. S 167, 59 S Ct. 389, 83 L. Ed. 586.
>
> "As they are not subject to regulation by the Congress in that condition, they are not within the contemplation of the Sherman Anti-Trust law, 15 U. S. C. A., §§ 1-7, 15 note, or any other anti-trust statute aiming to prohibit certain practices in interstate commerce."

The acquisition of rights to produce a motion picture must, we respectfully submit, be carefully distinguished from the actual distribution of the motion picture in its produced form.* While the latter may well be a transaction or series of transactions in interstate commerce, the former, which consists of an isolated occasional transaction wholly intrastate in its geography and character is not.

The transaction involved in the present case is no more an interstate transaction than the agreement involved in *Bernhardt v. Polygraphic Co. of America, Inc., supra,* which contemplated the departure of a New York resident for Vermont where he was to take up supervision of a product designed for interstate commerce, or a contract for the paving of streets in Texas by a Minnesota firm,

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*Not every transaction concerning the motion picture industry involves interstate commerce. See, *e. g.: Tad Screen Advertising, Inc. v. Oklahoma Tax Commission,* 126 F. 2d 544 (C. C. A. 10, 1942; *Boynton v. Fox West Coast Theatres Corp.,* 60 F. 2d 851 (C. C. A. 10, 1932).

held intrastate within the meaning of the United States Arbitration Act in *Tejas Development Co. v. McGough Bros., et al., supra.*[1]

II.

Whether or Not the Contract Here in Suit Is a Contract for Arbitration Is a Question of State Law. The Applicable State Law Is That of California. Under California Law the Contract Is Not an Agreement for Arbitration.

We believe it clear from *Bernhardt v. Polygraphic Company of America, Inc., supra,* that whether or not the agreement of sale is a contract for arbitration is, under the doctrine of *Erie R. Co. v. Tompkins, supra,* a question to be resolved by the application of the principles of substantive state law. The contract was made in California, to be performed in California, and we believe it clear that the state law having application is that of California.

Under the law of California, whether or not an agreement is for arbitration is governed by the intention of the parties, and the use of the word "arbitration" in an agreement is in nowise controlling as to whether the agreement is one for arbitration or not.

Rives-Strong Building v. Bank of America, 50 Cal. App. 2d 810, 817, 123 P. 2d 942 (1942);

Thompson v. Newman, 36 Cal. App. 248, 251, 171 Pac. 982 (1918).

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[1]Section 1 of the United States Arbitration Act (Title 9, U. S. Code, Sec. 1) defines commerce as that term is used in the Act as "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, . . ."

The transaction here involved, we respectfully submit, is not encompassed within the foregoing definition.

In *Rives-Strong Building v. Bank of America, supra,* at page 817 of the official report, the following statement appears:

> "Turning to the lease itself to determine what the parties intended, we find a very simple wording, with no conditions or restrictions placed upon the persons named, no method of procedure suggested and no hearings or notices mentioned. In fact, the provision is so aptly worded for the purpose of requiring a mere appraisal or valuation that if the word 'appraiser' is substituted for the word 'arbitrator' in the lease no serious contention could be made that the parties intended it to be a statutory arbitration agreement. *The use of the word 'arbitrator' is of course not controlling.* (Thompson v. Newman, 36 Cal. App. 248, 251 [171 Pac. 982].) Particularly is this true in view of the almost interchangeable manner in which these terms are commonly used in agreements." (Emphasis added.)

In *Thompson v. Newman,* the following appears, *supra,* 36 Cal. App. 251:

> "True, the contract in terms specifically uses the word 'arbitrators,' but that fact does not conclusively control the construction of the agreement. (Foster v. Carr, 135 Cal. 86 [67 Pac. 43].) The term 'arbitrators' evidently was incorrectly employed to designate the character and capacity of the men who had been, or might be, agreed upon to carry out the terms of a contract which, when read in its entirety, purported to provide for nothing more nor less than a mere appraisement."

It is the substance of the agreement, rather than what the parties call it, which will govern as to whether the agreement is one for arbitration.

Bewick v. Mecham, 26 Cal. 2d 92, 97, 156 P. 2d 757 (rehg. den. 1945);

Rives-Strong Building v. Bank of America, supra;

Thompson v. Newman, supra.

In attempting to ascertain the intention of the parties as to whether the agreement is one for arbitration, the courts judge the agreement by two criteria: They ask first, whether the parties intend a quasi-judicial hearing, with an opportunity to offer evidence, or whether on the contrary they intend that the Referee shall use his own judgment in arriving at the decision; and secondly, whether the Referee is to adjudicate a controversy or whether he is merely to make a determination which will avoid one.

Omaha v. Omaha Water Co., 218 U. S. 180, 195 (1910);

Bewick v. Mecham, supra;

Rives-Strong Building v. Bank of America, supra;

Dore v. Southern Pacific Company, 163 Cal. 182, 189, 124 Pac. 817 (1912);

M. E. Church v. Seitz, 74 Cal. 287, 291-293, 15 Pac. 839 (1887).

In *Bewick v. Mecham, supra,* a situation not unlike that presently before the Court was presented. The parties had agreed that the defendant would purchase property held under lease at a price subsequently to be fixed. Machinery to submit the price "to arbitration" was set forth in the event the parties were unable to agree upon a price. Plaintiff sued for specific performance and the defendant

moved for a stay pending arbitration. The Supreme Court of California declined to stay, holding that the agreement was not one for arbitration and therefore not susceptible to stay. The language of the Court is illuminating (*supra,* 26 Cal. 2d at page 97):

> "There is nothing in the agreement to indicate that the arbitrators were to take evidence in a formal proceeding as a basis for their decision rather than their own opinion and judgment."

The Court's reasoning was that the California Arbitration Act, which is similar to the United States Arbitration Act (Title 9 U. S. C. as compared with Sections 1280 *et seq.* of the Code of Civil Procedure of the State of California) had no application unless the agreement was one for arbitration in the strict sense of the word. In determining whether the agreement was for arbitration, the Court took the view that an agreement for arbitration contemplates the resolution of a controversy arising out of the agreement or the resolution of a controversy as to the refusal of the parties to perform the agreement and not merely the ascertainment of a fact or facts, which, once ascertained, may have the effect of avoiding controversy. The Court went on to point out that even where the agreement measured up to the first criterion, it was necessary also that the agreement contemplate that the arbitrators base their decision upon evidence formally adduced and not upon their own opinion and judgment.*

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*It is clear that the approach of the California courts is consistent with that generally followed in the United States. In *Omaha v. Omaha Water Co.,* the Supreme Court of the United States stated (218 U. S. at p. 195):

". . . As already hinted, this was not a board of arbitrators. An arbitration implies a difference, a dispute, and involves ordinarily a hearing and all thereby implied. The right to notice of hear-

Paragraph XIX(h)(3) of the Agreement of Sale (quoted in footnote, p. 3 of this brief) bears examination in the light of the foregoing. It does not contemplate a hearing but negates a hearing. It does not contemplate cross-examination of the evidence adduced, but negates cross-examination. It does not contemplate that the arbitrator shall arrive at his determination based on the evidence presented by the parties, *but specifically authorizes him to "secure advice and information independently."* This is not arbitration under the law of California.

We respectfully submit that an examination of the Agreement of Sale makes it apparent that the so-called arbitration clause goes only to accountings and not in any sense to the failure of the parties to perform the agreement or to improper performance. We believe it clear from the Complaint and from the contract that the only question to be submitted to the certified public accountants was that of the accuracy of the accounting or, stated otherwise, the purely ministerial, non-judicial task of inquiring into the correctness of the accounting from sound accounting principles. *Appellant does not question the accuracy of the accounting as measured by accounting standards.*

In *M. E. Church v. Seitz, supra,* the Supreme Court of California distinguishes arbitration from other proceed-

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ings, to produce evidence and cross-examine that produced is implied when the matter to be decided is one of dispute and difference. But when, as here, the parties had agreed that one should sell and the other buy a specific thing, and the price should be a valuation fixed by persons agreed upon, it cannot be said that there was any dispute or difference. Such an arrangement precludes or prevents difference, and is not intended to settle any which has arisen. *This seems to be the distinction between an arbitration and an appraisement, though the first term is often used when the other is more appropriate."* (Emphasis added.)

ings resembling arbitration in the following language (*supra,* 74 Cal. at pp. 291-292):

> "There are two time-honored rules in relation to arbitrators, one that courts will not enforce an agreement to submit to arbitration, or in other words, that it can be revoked; and the other that arbitrators must give notice of their sessions so as to afford the parties a right to be heard. These rules rest upon the same idea, viz., that an arbitration is a substitute for proceedings in court. It being considered against sound policy to allow parties to deprive themselves of their right of resort to the courts, agreements to that effect are not binding so long as they are executory; but if the parties choose to resort to other tribunals, such tribunals are held to the more important rules which govern courts in their proceedings.
>
> "It was found, however, that to apply the above rules to all agreements in which parties regulated their action by the determination of third persons would interfere with the ordinary transactions of mankind, and put unnecessary clogs upon business. Accordingly, in the well-considered case of Scott v. Avery, 5 H. L. Cas. 811, it was held that a condition in a policy of insurance in a mutual company that the loss should be 'ascertained and settled by the committee' was not a submission to arbitration in its proper sense, but was a condition precedent to the right of action. Similar decisions have been made in this and other states. (Citing cases.)
>
> "These cases hold that a contract by which the value of property or the amount of damage is, for the purpose of the contract, to be fixed by third persons, is not a submission to arbitration, and therefore to enforce it does not trench upon the jurisdiction of the courts. Now, if this is so—if such a

> proceeding is not analogous to the investigation by a court of a controversy between the parties—why need it be conducted according to the rules which govern courts in their investigations? We think that it need not; that the proceeding is a mere appraisement or valuation, which, although binding upon the parties, is not the submission of a controversy to arbitration, and is, therefore, not subject to the rules which govern arbitrators. And to this effect are the best considered cases."

It should not be necessary to point out that the formality required of arbitrators is lacking in the procedure set forth in the agreement and that the agreement is therefore not subject to the rules which govern arbitrators.

In a very recent case, *Cheminol Corporation v. Ohlsson,* 133 Cal. App. 2d 223, 226, 283 P. 2d 773 (1955), the matter of an accounting was left to an independent certified public accountant. The case is almost on all fours with the instant case. Discussing the accountant, Mr. Justice Ashburn states (*supra,* 133 Cal. App. 2d at p. 226):

> ". . . He has been referred to as an arbitrator, but his function seems to be that of a third party employed to determine a fact with the understanding that his finding would bind the parties in interest, which falls short of an arbitration; see Dore v. Southern Pacific Co., 163 Cal. 182, 189, 124 Pac. 817] Bewick v. Mecham, 26 Cal. (2d) 92, 97, 156 Pac. (2d) 757; 137 A. L. R. 1277; . . ."

We respectfully submit that the position of the certified public accountants in the instant case is identical with that of the certified public accountant in the case last cited. It was not, and could never have been the intention of the parties to submit serious questions of law to certified pub-

lic accountants. On the contrary, it was clearly their intention to submit only questions of accounting to certified public accountants and to leave questions of law to the courts. *Otherwise, the agreement would have been drawn differently and the arbitration clause would not have been limited to questions "as to any accounting."*

The Court's attention is invited to the case of *Seldner v. W. R. Grace & Co.,* 22 F. Supp. 388, 392 (D. C. Md., 1938), where the United States District Court for the District of Maryland quotes with approval 3 *American Jurisprudence, Arbitration and Award,* Section 102, as follows:

> "An exception to the rule stated above in regard to holding meetings and hearing evidence is recognized in those cases in which the character of the matter submitted and of the arbitrators chosen is such as to justify an inference that they were selected to act as experts and to adjudge the matter from their own knowledge. Here it is not essential that the evidence shall have been heard unless the submission so provides. In the absence of such a provision in the submission, a refusal to receive testimony is not ground for setting aside the award. *It will be observed that under such circumstances, the proceeding is likely to be more in the nature of an appraisement than an arbitration.* . . ."

A particularly pertinent case arising in another jurisdiction, but construing the applicability of a statute similar in tone and effect to Title 9, U. S. Code, §3, and the California Arbitration Law, is that of *Shepard & Morse Lumber Co. v. Collins,* 198 Ore. 290, 296, 256 P. 2d 500, 503 (1953). The matter in issue was the extent of the plaintiff's injury, and it had been agreed that if either party was dissatisfied with the attending physician's determination, the matter would be referred to a three-

physician board. The injured party refused to submit the question to the board and brought suit immediately for his damage. The other party moved for a stay.

The Supreme Court stated the principal issue to be whether the agreement was a contract to arbitrate within the meaning of the statute. It pointed out, *supra,* 198 Ore. at page 296 that "verification of the performance of a contract, by third parties, is likely to be held to partake of the character of appraisals." It then held that the procedure established was an appraisement procedure and not a true arbitration within the sense of the statute and that, under the circumstances, a stay was not appropriate.

The Court relied on 6 *Williston on Contracts* (Rev. Ed.), Section 1921a, wherein the learned commentator points out that the true distinction between a contract for arbitration and a contract for appraisement lies in whether the umpires are to determine the ultimate liability of the parties or merely facts incidental thereto.

We believe it entirely clear, under the language of the agreement here in question, that the court is dealing with an agreement for appraisement and not for arbitration and that under all of the circumstances a stay is inappropriate. The agreement presently before the Court does not contemplate that the umpire shall determine the ultimate liability of the parties. It does not provide for formal hearings. It does not provide that the decision of the umpire shall be based upon the evidence adduced through the efforts of the parties, but affirmatively provides that the umpire may rely upon strangers to the proceeding for advice and information.

The agreement contemplates only the submission of the narrow question whether correct accounting procedures

have been followed, such submission to be to experts in the field of accounting. The agreement does *not* contemplate the adjudication of a controversy arising out of a contract, the *sine qua non* of an arbitration agreement.

The plaintiff, as hereinabove indicated, does not question the correctness of the accountings as matters of accounting. He is not asserting that monies shown in the statements as having been spent were not in fact spent. This action goes to the contract itself and not to the defendant's manner of reporting its performance of the contract. It goes rather to whether or not defendant has performed. This is not a matter of accounting but a matter of law for a court to determine, and it was never contemplated by the agreement that such serious and weighty issues of law should be resolved by certified public accountants.

III.

None of the Issues in This Action Are Referable to Arbitration Under the Agreement.

If it be assumed for the purpose of argument that the contract contains an agreement for arbitration, then it becomes necessary to determine whether any of the issues in the instant case are within the arbitration clause.*

The Court will note that the arbitration clause is limited to controversies "as to any accounting by Purchaser with respect to the share of Pictures in the net profits of the picture."

None of the issues in the present action is referable to the accounting. All issues go solely and exclusively to a

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*Title 9, U. S. Code, Sec. 3, specifically provides that the Court must be "satisfied that the issue involved . . . is referable to arbitration under such an agreement. . . ." (See Appendix "A.")

breach of contract or a repeated series of contractual breaches, perpetrated by the defendant. The issues raised by the Complaint are not issues of accounting, but issues of contract law.

The Court's attention is invited once more to Title 9, U. S. Code, §3, which provides for a stay of proceedings if a suit is brought "upon any issue referable to arbitration." If we assume *arguendo* that the contract involves commerce, and is one for arbitration and had plaintiff questioned the accuracy of accountings, it would follow that a stay would be in order. But here, apart from other considerations, the accuracy of the accountings is not challenged and there can be no stay, since none of the issues is referable to arbitration.

IV.
Appellee Is in Default in Proceeding With Arbitration.

The Court's attention is once more invited to the language of Section 3 of the United States Arbitration Act (9 U. S. C. §3). The Act is explicit in stating that an applicant for a stay of proceedings pending arbitration is not entitled to a stay if he is in default in proceeding with the arbitration.

Under the circumstances as related in the affidavit of Stuart L. Kadison [Tr. p. 57], the appellee is in default in proceeding with the arbitration and cannot, in view of such default, seek a stay of judicial proceedings.

See:

American Locomotive Co. v. Chemical Research Corp., 171 F. 2d 115 (6 Cir., 1948);

Radiator Specialties Co. v. Canon Mills, 97 F. 2d 318 (4 Cir., 1938).

The Court's attention is invited to the fact that the issues mentioned in said affidavit are not the issues raised by the complaint.

Conclusion.

It is respectfully submitted that the court below erred in granting appellee's motion for a stay of proceedings. More particularly, it erred in finding applicable the United States Arbitration Act, the contract in question not being a contract in interstate commerce. It further erred in determining that the agreement was one for arbitration and, assuming that it was correct in such determination, it erred in determining that all or any of the issues of the present case were referable to the arbitration agreement. Finally, there was error in granting a stay to the appellee who was in default in proceeding with the arbitration.

The effect of the errors below, unless corrected by this Court, will be to require appellant to litigate substantial questions of law relating to the construction of a complex and involved agreement before certified public accountants in the City of New York.

We respectfully submit that the errors of the court below should be corrected and the case returned for a trial on the merits.

Pacht, Ross, Warne & Bernhard,
By Isaac Pacht,
Stuart L. Kadison,
Attorneys for Appellant.

APPENDIX A.

The provisions of the Federal Arbitration Act (Title 9, U. S. Code, §1 *et seq.*) pertinent to this appeal, are set out below for the convenience of the Court.

1. " 'Maritime transactions', as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; 'commerce', as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

2. "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

3. "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

No. 14999

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK ROSS,

Appellant,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation,

Appellee.

APPELLEE'S BRIEF.

MUSICK, PEELER & GARRETT,
HAROLD F. COLLINS,
THEODORE A. McCABE, JR.,
621 South Hope Street,
Los Angeles 17, California,
Attorneys for Appellee Twentieth Century-Fox Film Corporation.

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vs.

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Appellee.

APPELLEE'S BRIEF.

Jurisdictional Statement.

As indicated in Appellant's Brief (App. Br. 2, 3), the jurisdictional basis for his action in the United States District Court is the alleged diversity of citizenship of the parties (28 U. S. C. 1332(a)(1)). It ought to be noted, however, that this jurisdictional basis is challenged in the Answer to Complaint [Tr. 49-57] which appellee, as defendant, filed at the time it filed its motion for a stay of proceedings. The Third Affirmative Defense pleaded in the Answer [Tr. 54] alleges that there has been a non-joinder as plaintiffs of several assignees of fractional interests in the assets of the Corporation to which appellee had agreed to pay stated percentages of

the net profits realized from distribution of the photoplay "The Robe", and that if those persons had been joined the jurisdictional requisite of diversity of citizenship would not exist.

Appellant asserts that this court's appellate jurisdiction to review the ruling of the trial court is conferred by section 1292(1), Title 28, U. S. Code, on the theory that a stay order is in effect an interlocutory order granting an injunction (App. Br. 2).

For many years there was divergence among the rulings of various Circuit Courts of Appeal as to the appealability of stay orders. The tests of appealability applied by the United States Supreme Court in its review of a series of Circuit Court decisions in recent years has evolved a rule of appealability based principally on the old distinctions between actions at law and proceedings in equity, which distinctions, ironically enough, were believed to have been eliminated upon the adoption of the Federal Rules of Civil Procedure (see F. R. C. P., Rules 1 and 2).

The present rule, as gleaned from the case of *Baltimore Contractors, Inc. v. Bodinger,* 348 U. S. 176, 75 S. Ct. 249; 99 L. Ed. 233 (1955), appears to be that an appeal will lie where a stay-order has been made in a "law" type action, but will not lie where such an order has been made in an "equity" type case. Therefore, appealability of the instant ruling hinges on this court's classification of appellant's pending action as one at law or in equity.

In form, the complaint purports to plead a cause of action at law for money, but when analyzed in the light of the equitable issues it tenders, the court may well conclude that this is an equitable proceeding whose ultimate determination must abide the results of an accounting, if not by arbitrators, then in the trial court. (See *Coward v. Clanton,* 122 Cal. 451 (1898); *Hapgood v. Berry,* 157 Fed. 807 (C. C. A. 8, 1907).) In determining whether a proceeding is legal or equitable, it has been authoritatively stated that "the courts are not bound by the pleadings or the form of the action." (31 Am. Jur. 570, Jury §21.) For example, in determining whether the right to a jury trial exists,

> "The right must be determined by the real, meritorious controversy between the parties as shown by the whole case . . . In determining the essential character of the suit or remedy within this rule, the entire pleadings and all the issues raised are to be examined, and not merely the plaintiff's declaration, complaint or petition, or his evidence." (31 Am. Jur. 570.)

Independently of the foregoing challenges to jurisdiction, it appears that in keeping with earlier rulings by this court, the purported appeal in this matter is a nullity and must be dismissed. Attention is directed to the form of the purported order or judgment from which appellant has appealed. The Notice of Appeal [Tr. 67] is "from the order entered November 29, 1955, staying the above-entitled cause." But the only entry made on that date, as appears from the Transcript of Record, was in the

form of "Minutes of The Court" [Tr. 66] which recite "Proceedings: Rulings on Submitted Matter. The court has this day granted the Defendant's Motion to Stay Proceedings, heretofore heard on Nov. 28, 1955. Counsel notified." In *Wright v. Gibson,* 128 F. 2d 865 (C. A. 9, 1942) this court ruled that a minute entry very similar textually to the instant one did not constitute the entry of an order, judgment or decree from which an appeal might be taken. We submit that if the rule of the *Wright* case is adhered to, the instant appeal must be dismissed. The decisions of this court, both before and since the *Wright* case, are all to the same effect. See *City etc. San Francisco v. McLaughlin,* 9 F. 2d 390 (C. A. 9, 1925); *U. S. v. State of Arizona,* 206 F. 2d 159 (C. A. 9, 1953), and cases cited at page 160, footnote 1. Accordingly, the appeal is dismissible on the court's own motion. (*City etc. San Francisco v. McLaughlin, supra;* 13 Cyc. Fed. Proc. (3ed.) §63.111 and cases cited there.)

Issues Presented.

The controlling issue is whether the stay granted by the trial court was authorized. Appellant (plaintiff below) in his brief argues that the stay was unauthorized, that the controversy disclosed by the complaint is not a controversy within the scope of the arbitration provisions of the contract, and that appellee (defendant below) is in default in proceeding with arbitration.

Appellee contends that the trial court was justified in granting appellee's Motion for Stay of Proceedings pend-

ing arbitration, because the document under consideration [Tr. 17-43, Ex. A] is a "contract evidencing a transaction involving commerce" as that phrase is used in Section 2, Title 9, U. S. Code. Alternatively, appellee argues that it had a right to a stay under state law (Cal. Code Civ. Proc., §1280, *et seq.*) if it should be held that the instant contract did not involve interstate commerce. See *Bernhardt v. Polygraphic Company of America, Inc.*, 350 U. S. 198, 76 S. Ct 273; 100 L. Ed. Adv., p. 203) (1956).

Summary of Argument.

The argument of appellee may be summarized as follows:

1. The contract of the parties evidences transactions involving interstate commerce.

2. The contract is an enforceable arbitration agreement under California law which accords appellee a right to a stay of judicial proceedings pending arbitration.

3. The contract provides for arbitration of the issues described in the complaint filed by appellant.

4. Appellee is not in default in proceeding with arbitration.

ARGUMENT.

I.

The Contract of the Parties Evidences Transactions Involving Interstate Commerce.

The Federal Arbitration Act (U. S. Code, Title 9, §§1, *et seq.*) recognizes the validity and enforceability of a provision for arbitration, if it is contained in a contract evidencing a maritime transaction or a transaction involving interstate commerce. Appellee makes no claim that the instant contract involved a maritime transaction. On the other hand, and in opposition to appellant's claim that the contract is a simple agreement of sale, appellee contends that a fair reading of the contract shows its intendment to be the production of a photoplay, followed by distribution of that photoplay throughout the world, and that, therefore, it is a contract which evidences transactions involving interstate commerce within the scope of the Federal Arbitration Act.

The rule applicable to the interpretation of contractual documents generally must be observed in construing the intention of the parties here, namely, by reading the written instrument itself and giving a reasonable construction to the terms used. (See Cal. Civ. Code, §§1638-1644; Cal. Code Civ. Proc., §§1856-1861.)

The document is captioned "Agreement of Sale", but its provisions make it clear that it contemplates and provides for more than a sale of chattels. Appellant transferred the rights to a novel, "The Robe", certain manuscripts, compositions, screenplays, copyrights, and other assets. Noteworthy is the provision in the agreement that appellee, designated therein as "Purchaser", ". . . *agrees to produce and distribute a motion picture photoplay to be*

based upon or adapted from said novel entitled 'The Robe'." [Tr. 25, Ex. A, Art. X.] (Emphasis supplied.) The contract specifies the manner in which the proceeds from distribution of the picture are to be shared between appellant and appellee. Repeated use of the phrase "throughout the world" [Tr. 18, Ex. A, Art. I; Tr. 19, Ex. A, Art. II; Tr. 21, Ex. A, Art. III; Tr. 22, Ex. A, Art. V]; and the use of such expressions and phrases as "copyright in any country in the world" [Tr. 24, Ex. A, Art. IX] indicate that it contemplates distribution of the contemplated photoplay throughout the world. For example, the contract provides [Tr. 31, Ex. A, Art. XIX (b)] that Purchaser's distribution fees for "distribution in the United States and Alaska" shall be 25% and for "distribution in Canada and all other foreign territories" shall be 30% of "net profits" realized from "the gross receipts of the Picture throughout the world" [Tr. 31, Ex. A., Art. XIX(a)]; then follow detailed provisions for handling foreign revenues accruing "from the distribution or sale or other disposition of distribution or exhibition rights in the Picture in any place foreign to the United States, under contracts made in terms of foreign currency" [Tr. 33, Ex. A, Art. XIX(g)1; also see Tr. 34 and 35].

Appellant chooses to ignore the language of the contract itself. For example, appellant describes the document as "a simple agreement for the sale of personal property" (App. Br. 11). Elsewhere appellant seems to be suggesting (although he stops short of stating directly) that this contract is not concerned with distribution, for he says: "The acquisition of rights to produce a motion picture, must, we respectfully submit, be carefully distin-

guished from the actual distribution of the motion picture in its produced form" (App. Br. 14).

The statement read in detachment is a platitude, but read in the context in which it is placed in Appellant's Brief, it is specious sophistry. A simple refutation to any argument that the contract does not relate to world-wide distribution will be found in the answer which appellant makes to this query: Would appellant acknowledge that he would have no recourse against appellee, if it, as Purchaser, had refused to distribute the photoplay outside a single state of the United States, or in Canada or elsewhere in the world after it had concluded its purchase of appellant's miscellaneous rights in the property? —bearing in mind that the consideration which the contract provides shall be payable by appellee as Purchaser to the seller (of whom appellant is an assignee) is not a sum certain, but is a portion of the "net profits" realized from world-wide distribution [Tr. 27, Ex. A, Art. XI (e)].

The basic obligations of appellee, the Purchaser, as stated in the words of the contract itself, are to "produce and distribute", and also account, for the earnings of the contemplated photoplay. In the recent case of *U. S. v. Schubert,* 348 U. S. 222, 75 S. Ct. 277, 99 L. Ed. 279 (1955), Chief Justice Warren said:

> "'[T]rade or commerce' has been held to include the production, distribution and exhibition of motion pictures . . ."

The *Schubert* opinion cites some of the many cases which have held that the motion picture industry is intimately involved in interstate commerce. See, *e. g., Binderup v. Pathe Exchange,* 263 U. S. 291, 44 S. Ct. 96, 68 L. Ed.

308 (1923), where the Supreme Court noted the interstate character of the production-distribution phases of the motion picture business, as follows (263 U. S., at p. 309):

> ". . . The business of the distributors, of which the arrangement with the exhibitor here was an instance, was clearly interstate. It consisted of manufacturing the commodity in one state, finding customers for it in other states, making contracts of lease with them, and transporting the commodity leased from the state of manufacture into the states of the lessees."

The instant contract involves, in addition to distribution, the production of motion picture, as its language clearly shows. As indicated in the quotation from the *Binderup* case, *supra,* the production of motion pictures is a specialized form of manufacturing.

The status of manufacturing as interstate commerce was reviewed in detail by the United States Supreme Court in *Mandeville Island Farms v. American Crystal Sugar Co.,* 334 U. S. 219, 68 S. Ct. 996, 92 L. Ed. 1328 (1948). The opinion notes the steady erosion and ultimate elimination of the old concept that production and manufacturing somehow were distinguishable from the commerce which they generated. The modern concept of the law is thus expressed in the *Mandeville* case opinion:

> ". . . The artificial and mechanical separation of 'production' and 'manufacturing' from 'commerce', without regard to their economic continuity, the effects of the former two upon the latter, and the varying methods by which the several processes are organized, related and carried on in different industries or indeed within a single industry, no longer suffices

to put either production or manufacturing and refining processes beyond reach of Congress' authority or of the statute . . ." (334 U. S. at p. 229.)

"* * * * * * * *

"The formulation of the *Shreveport* doctrine was a great turning point in the construction of the commerce clause, comparable in this respect to the landmark of *Cooley v. Port Wardens*, 12 How (U. S.) 299, 13 L. Ed. 996. For, while the latter gave play for state power to work in the field of commerce, the former broke bonds confining Congress' power and made it an effective instrument for fulfilling its purpose. The *Shreveport* doctrine cut Congress loose from the haltering labels of 'production' and 'manufacturing' and gave it rein to reach those processes when they were used to defy its purposes regarding interstate trade and commerce. In doing so the decision substituted judgment as to practical impeding effects upon that commerce for rubrics concerning its boundaries as the basic criterion of effective congressional action." (334 U. S., at pp. 232, 233.)

The argument of appellant that a contract involving not only distribution of motion pictures but also production thereof does not evidence a transaction involving commerce is utterly unrealistic in the light of the developing concepts of commerce as expounded by the Supreme Court of the United States in the many cases described and summarized in the *Mandeville* case. The modern legal doctrine of commerce applicable to industries, such as the motion picture industry, which embrace production, distribution and marketing activities, must not yield to decisions of yesteryear, cited by appellant, which hold that

a grocery store or gas station may not be in interstate commerce.

The two decisions cited by appellant in support of his observation that "Not every transaction concerning the motion picture industry involves interstate commerce" (App. Br. 14, footnote), are readily distinguishable. The court in *Tad Screen Advertising, Inc. v. Oklahoma Tax Commission,* 126 F. 2d 544 (C. A. 10), merely held that a state may tax receipts of an advertiser, who claimed that the commerce clause forbade such tax since his advertising was done on motion picture theatre screens. In the other cases, *Boynton v. Fox West Coast Theatres Corp.,* 60 F. 2d 851 (C. A. 10), the court held that a Kansas law restricting Sunday movies was not invalid under the commerce clause. It is difficult to appreciate the pertinency of such decisions to the issue here presented.

It is important to keep in mind that Section 2, Title 9, U. S. Code, applies to arbitration provisions in contracts evidencing transactions *involving* commerce. The transactions need not be *in* interstate commerce. The transaction must only *involve* such commerce. As was said in *Culver v. Kurn,* 354 Mo. 1158, 1163; 193 S. W. 2d 602, 604 (1946): " 'Involve' imports the idea of 'implicate', 'include', 'affect'." To hold that the large scale production and distribution of the motion picture undertaken under the contract under consideration here does not involve or affect interstate commerce would be a negation of the entire trend of Supreme Court decisions defining the commerce concept. Recent cases dealing with the clause "involving commerce" under 9 U. S. Code, Sec. 2, indicate the trend toward a broad view of commerce. Compare: *In re Cold Metal Process Co.,* 9 Fed. Supp. 992 (W. D.

Pa. 1935)* with *Petition of Prouvost Lefebvre, etc.,* 105 Fed. Supp. 757 (S. D. N. Y. 1952), and *Wilson & Co. v. Fremont Cake & Meal Co., 77* Fed. Supp. 364, 373 (D. Neb. 1948).

II.

Even if the Instant Contract Did Not Involve Commerce, It Would Be Valid Under California Law, and California Courts Would Grant a Stay.

Assuming, *arguendo,* that the instant contract does not involve commerce within the purview of the Federal Arbitration Act, nevertheless a stay of proceedings should still be granted by a federal court exercising diversity jurisdiction in accordance with state law, since appellee agrees with appellant that a contract not involving commerce would be construed and treated in accordance with state law under the recent holding of the United States Supreme Court, *Bernhardt v. Polygraphic Co.,* 350 U. S. 198, *supra.* Appellee acknowledges that in such circumstances the issue is whether the contract is valid under state law.

The basic contention of appellant seems to be that the arbitration provisions of the contract are really nothing more than valuation provisions. To demonstrate the worthlessness of this contention, once more we must refer to the contract. Appellant, of course, has at an earlier

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*The opinion in this case is less than satisfactory. Apart from reflecting an antiquated concept of commerce, it cites and relies on *Zip Mfg. Co. v. Pep Mfg. Co.,* 44 F. 2d 184 (D. C. Del. 1930), and *In re Woerner,* 31 F. 2d 283 (C. A. 2, 1929), neither of which involved the commerce issue, directly or indirectly. The former case held that questions as to validity of patents were not arbitrable. In the latter case, a brief opinion by Manton, J., held that the allegations of the complaint failed to show jurisdiction.

point assumed that the agreement was "a simple agreement for the sale of personal property" (App. Br. 11), which it is not. Appellee agreed to produce and distribute a motion picture, based on a novel supplied by appellant, and agreed to share the profits according to a formula, which, among other things, allowed appellee to recover 25% of direct expenses as compensation for studio overhead [Tr. 32]. The complaint alleges that appellee really charged 51.695% [Tr. 8]. Since appellant asserts that he does not challenge appellee's mathematics (App. Br. 19), it must be clear to the court that the controversy must be over the definition of the direct charges on which the 25% is charged, which is in fact the issue. If appellee has correctly classified as direct charges the items on which the 25% was charged, it wins. If it did not, appellant wins. The arbitration clause, designed to settle any controversy over the classification of expenses, could not be more in point. But, appellant says the arbitration provisions are for a "valuation", although it is quite unclear just what he thinks is being valued. Of the cases cited by appellant, *Rives-Strong Bldg., Inc. v. Bank of America,* 50 Cal. App. 2d 810 (1942), is typical. There a landlord and tenant made a lease with no fixed rental provision beyond the first 4½ years, with provision for establishment of a fair rent by three "arbitrators." The arbitrators made a determination, the landlord refused to accept it and brought suit for fair value of the premises, contending that the action of the three arbitrators did not conform to the procedural requirements of the California Arbitration Act. The court held that the determination was not an arbitration for the purposes of applying the procedural requirements of the California Arbitration Act. The court

pointed out that the arbitration statute in California as it existed at that time provided for arbitration only of controversies "which might be the subject of a civil action" between the parties. The court said (p. 814):

> "As the determination of values or other calculations involved in voluntary contracts between individuals, and therein for convenience left to third persons, could not be the subject of a civil action, it seems clear that the statute was not intended to apply to this type of agreement."

To the same effect on similar facts is *Thompson v. Newman,* 36 Cal. App. 248 (1948). That the absence of a subject which could be the basis of a civil action was the rationale of decision in *Rives-Strong* and similar cases is made clear in *Cathcart v. Security Title etc. Co.,* 66 Cal. App. 2d 469 (1944).

The other cases cited by appellant are not dissimilar. In *M. E. Church v. Seitz,* 74 Cal. 287 (1887), the question to be referred to the arbitrators was the fair value of fixtures which a lessee had an option to require the lessor to purchase at a price fixed by the arbitrators. The contention in that case was that the common law procedural requirements for arbitrators had not been met. The court said that the proceeding in question was not akin to an arbitration because there was no dispute of the type which is usually resolved in a proceeding "analogous to an investigation by a Court."

The basis of decision in those cases was that the agency selected was strictly a "fact-finding" agency and was not authorized to pursue matters to the extent of resolving a dispute by making an enforceable award. The proceeding in the present case is obviously intended to deal

with a matter on which, absent an agreement, a civil action could be filed (and, may we observe, has been filed) to tender issues which appellant chooses in this court to characterize as mere "valuation" questions.

Each case appellant cites for the proposition that a third party was not an arbitrator, but an appraiser, arose in substantially the same manner. A person who had agreed to be bound by the decision of a third party became dissatisfied with the third party's decision, and sought to avoid his agreement on the ground that the procedural requisites of a formal arbitration were not met. In each case, the dissatisfied one was held to his bargain, the court finding that the procedural requisites of a formal arbitration are unnecessary. In such cases there is manifest a judicial disposition to disallow the objections of a dissatisfied party, who refused to live up to his agreement after the third party had made his decision. Even if such cases might be said to have some tenuous relevancy to the problem, they should be critically applied here, where appellant obviously places reliance upon them to escape rather than to implement his contractual commitment to resort to arbitration.

Apart from an insubstantial claim that the controversy disclosed by the complaint is one over "value" of something, appellant makes two other contentions. One is that because the arbitration clause provides for presentation of the dispute to the arbitrators in writing and not orally and also provides that the arbitrators may "secure advice and information independently" that the agreement does not properly provide for arbitration. Appellant gratuitously concludes that "This is not arbitration under the law of California." (App. Br. 19.) This position is not supported by authority (authorities *contra* are collected in

the U. S. Supreme Court's opinion in *Bernhardt v. Polygraphic Co.,* 350 U. S. 198, at footnote 4). That it is proper for an arbitrator to seek independent information and advice was recently reiterated by the California Supreme Court in *Griffith Co. v. San Diego College for Women,* 45 Cal. 2d ...., 289 P. 2d 476 (1955), where, at page 479 the court quotes approvingly its earlier opinion in *Sapp v. Barenfield,* 34 Cal. 2d 515, 521, 212 P. 2d 233, 238:

> "This procedure may be *ex parte,* without notice or hearing to the parties, for 'it is entirely proper for arbitrators, in a case requiring it, to obtain from disinterested persons of acknowledged skill such information and advice in reference to technical questions submitted to them, as may be necessary to enable them to come to correct conclusions, provided that the award is the result of their own judgment after obtaining such information.'" (Citing 1 Mechem, Agency §310, p. 229, and numerous cases.)

The arbitration clause provides for an exchange of views in writing, with a copy of each writing sent to the adversary. This surely provides an adequate hearing.

The arguments of appellant are without substance. The questions presented for arbitration in this proceeding clearly are not valuation matters, as appellant assumes without citing supporting judicial authority. There is nothing to be evaluated here. The question is, as may be seen from the Complaint, whether defendant has properly allocated costs and charges in its accounting for the profits of the subject motion picture. This suit would be stayed by a California Court (Cal. Code Civ. Proc., Sec. 1280, *et seq.*), and the stay granted in the District Court would therefore be proper, even if the contract were not one evidencing a transaction involving commerce.

III.

Whether the Contract Is Construed as One Evidencing Transactions Involving Commerce, or as One Enforceable Under State Law, the Issues Tendered in the Complaint Are Referable to Arbitration.

The controversy between appellant and appellee manifestly involves accounting matters, chiefly whether the proper system of classifying direct expense was used by appellee, and whether certain expenses which relate to the CinemaScope process were chargeable to the photoplay "The Robe." As already pointed out, the complaint alleges that appellee charged 51.695% of direct expenses as overhead [Tr. 8, 9]; significantly the allegations of the complaint are not capable of being construed as charging the gravamen of injury to be that appellee's accountants have failed to multiply the sum of the direct expenses by percentage factor of 0.25. Rather, the issue as pleaded is whether the direct charges were properly designated as such. Also, the complaint alleges that CinemaScope expenses were charged to "The Robe." The arbitration provisions of the contract are designed to provide for arbitration of any dispute as to the cost of producing the negative [Tr. 35-37], or "as to any accounting" [Tr. 38]. In both cases the arbitrators are to be "certified public accountants" [see Tr. 37, 38].

Appellant characterizes the complaint as presenting "serious and weighty issues of law" (App. Br. 24), but it is difficult to glean from the document just what these are. Depending upon one's construction of the complaint, it either charges appellee with faulty mathematics or with faulty accounting; wherein the determination of either fact presents a "serious and weighty issue of

law" that the parties could not possibly have intended to allow accountants to decide remains unexplained and unsupported. True, a breach of the accounting standards expressed or implied in the contract would be a breach of contract, but the only two questions presented by the complaint are a determination of appellee's obligations under the contract and whether or not appellee has performed those obligations. Even if questions of law were involved, the matter would be no less arbitrable. In *Pacific Indemnity Co. v. Insurance Co. of North America,* 25 F. 2d 930 (C. A. 9, 1928), this court said (p. 932):

> "It is next contended that the state arbitration law does not govern disputes as to the legal construction or wording of contracts, but only disputes as to questions of fact arising out of them. Section 1281 of the Code of Civil Procedure, as amended (St. Cal. 1927, p. 404, §2), provides:
>
> " 'Two or more persons may submit in writing to arbitration any controversy existing between them at the time of the agreement to submit, which arises out of a contract or the refusal to perform the whole or any part thereof or the violation of any other obligation.'
>
> "This section is broad enough to authorize the submission of any and all questions arising under a contract, whether such questions relate to the construction of the contract or to questions of law or fact arising thereunder."

Perhaps the basic fallacy of appellant's argument on this point is his failure to distinguish between accounting and bookkeeping. A fair analysis of the complaint makes it clear that the issue presented is whether or not in a number of different instances, defendant (appellee) has

properly *classified* various expenditures as direct expense chargeable to "The Robe." The American Institute of Accountants has promulgated a definition of accounting for observance in treating A. I. A. documents. This definition reads as follows:

> "Accounting is the art of recording, *classifying* and summarizing in a significant manner and in terms of money, transactions and events which are, in part at least, of a financial character, and the results thereof." (A. I. A. Accounting Research Bulletin No. 5, Oct. 1940.) (Emphasis added.)

Appellant apparently would omit the concept "classify" from any definition and synonymize accountants and accountancy, respectively, with bookeepers and their routine functions of assembling and tabulating invoices and vouchers and verifying arithmetical sums. Accounting commonly requires consideration, analysis and resolution of business practices and conduct having fiscal aspects or consequences; for example, whether certain costs are reasonable and proper charges against one account or another or neither, and whether the costs as recognized contribute to the acquisition of the income to which they are charged; and whether a net profit or loss is recognizable. A mere bookkeeper does not customarily treat or resolve matters of such magnitude. Since Appellant's Brief concedes (App. Br. 19, 24) that sound accounting principles were used in preparation of the statements reporting appellant's participation in the proceeds of the subject photoplay, the conclusion seems inescapable that there really is no complaint he may justly make if the concession made in his brief is literally accepted. Thus, it seems apparent that appellant either is confusing the concepts of accounting and bookkeeping or that in effect he is asking

this court to ignore commonplace business customs and traditions, and to make arbitrary innovations. We trust that the court will not be so tempted.

The language of the contract itself justifies the inference that the parties foresaw the possibility that accounting controversies might arise. Therefore, it is quite understandable that they should make provision in their contractual documents that such questions be determined by a class of arbitrators familiar with the subject, namely, accountants of recognized standing.

Since the issues disclosed by the complaint are referable to arbitration, the grant of the stay by the District Court was proper.

IV.

Appellee Is Not in Default in Proceeding With Arbitration.

Appellant contends (App. Br. 25-26) that appellee is in default in proceeding with arbitration, yet no basis for such a claim is indicated and no supporting authority is cited. In his brief (App. Br. 25) appellant seems content to rely on the affidavit of his counsel, Stuart L. Kadison [Tr. 57] that there has been a default, but the reference to the affidavit is followed immediately by a patently contradictory statement (App. Br. 26), that the affidavit relates to matters not involved in this suit. Despite the confusing effects which such Machiavellian-type argument produces, the fact remains that there is nothing in the affidavit of Stuart L. Kadison which indicates that appellant ever asked for arbitration of the controversies described in the complaint, or that appellee failed to cooperate in that regard. Since it is appellant who charges that appellee has committed wrongful acts, it is the re-

sponsibility of appellant to request arbitration of these matters, for appellee has no duty to demand arbitration of alleged controversies when it is perfectly satisfied with its performance under the contract. Thus, appellant's claim that appellee is in default in proceeding to arbitrate questions on which appellant has never requested arbitration is a contention which fails because of its own infirmity.

The letter of Stuart L. Kadison, attached as Exhibit A to the affidavit of Stuart L. Kadison [Tr. 59], in addition to demanding arbitration of specific controversies not here involved, makes a general statement that there are "other matters" on which arbitration should be had [Tr. 60]. Even if this omnibus phrase is construed as a demand for arbitration of the issues raised by this complaint, the claim that appellee is in default is patently groundless, since this suit was filed *one day* after the letter demanding arbitration was dispatched. In support of his claim that a delay of one day is sufficient to place appellee in default in proceeding with arbitration, appellant cites two cases.

One of these (*American Locomotive Co. v. Chemical Research Corp.*, 171 F. 2d 115), holds that a delay of *more than seven years* after filing an answer to a complaint effectively barred the defendant from asserting that the matters set out in the complaint should be arbitrated. The second case (*Radiator Specialities Co. v. Cannon Mills*, 97 F. 2d 318), holds that a delay of *nine months* after filing of the answer placed the defendant in default with proceeding with arbitration, particularly when the motion to stay pending arbitration was made on the date the trial of the action was to begin. Apparently appellant contends that these cases are authority for the proposition that the lapse of *one day* placed appellee in default in

proceeding with arbitration. Actually there was no recognizable delay in dealing with appellant's request. The affidavit of appellee's Resident Counsel, Frank H. Ferguson [Tr. 62] discloses that appellant's demand was promptly forwarded to those persons in appellee company who had the information relating to the alleged controversy, and that before they could act or reasonably be expected to act, this suit was filed. In short, appellant's argument respecting default is untenable in fact and in law.

Conclusion.

Appellee respectfully submits that the stay granted by the court below was clearly authorized because the issue was arbitrable under the agreement and appellee was not in default in proceeding with arbitration. Accordingly, the order of the trial court should be affirmed, provided, of course, the court does not dismiss the appeal for want of an appealable order.

Respectfully submitted,

MUSICK, PEELER & GARRETT,
HAROLD F. COLLINS,
THEODORE A. MCCABE, JR.,
Attorneys for Appellee Twentieth Century-Fox Film Corporation.

No. 14999.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK ROSS,

Appellant,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

PACHT, ROSS, WARNE & BERNHARD,
By ISAAC PACHT,
STUART L. KADISON,
HARVEY M. GROSSMAN,
6535 Wilshire Boulevard,
Los Angeles 48, California,
Attorneys for Appellant.

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FRANK ROSS,

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vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

Jurisdictional Status.

Before proceeding to the merits, certain statements in appellee's brief in regard to jurisdictional matters are deserving of brief attention.

Appellee refers to the fact that its answer has raised, by way of affirmative defense, an issue as to diversity of citizenship of the parties. Manifestly, this issue was not passed upon by the court below in granting a stay of proceedings pending arbitration, and therefore it presents nothing for consideration by this Court on the present appeal.

Appellee next contends that the order appealed from in the present case might not be appealable under the rule

voiced in *Baltimore Contractors, Inc. v. Bodinger,* 348 U. S. 176 (1955). Appellee concedes that an appeal will lie where a stay order has been made in an action at law (Appellee's Br. p. 2), and that the complaint in the instant case appears to plead a cause of action at law for money. Nevertheless, appellee suggests that the court might conclude that this is an equitable proceeding. The only ground offered for this proposition is the possibility that an accounting might be required in the trial court to determine the precise amount due appellant as a result of appellee's breach of contract. Neither of the cases cited on this point by appellee (*Coward v. Clanton,* 122 Cal. 451, 55 Pac. 147 (1898); *Hapgood v. Berry,* 157 Fed. 807 (C. C. A. 8, 1907)), support its proposition.

The pertinent portion of *Coward v. Clanton, supra,* stands rather for the proposition that an accounting may be had even if the action is basically one at law rather than in equity. The court's language on this point was as follows (*supra,* 122 Cal. at pp. 453-454):

> "I do not understand the suggestion that the court has no jurisdiction to compel an accounting unless a partnership was created. If plaintiff has a cause of action of which the court has jurisdiction, and it is necessary to have an accounting to determine his rights, it will be done. (*San Pedro etc. Co. v. Reynolds,* 121 Cal. 74.) Whether the facts would have given jurisdiction to a court of equity is of no consequence. We have no such courts, but our courts afford the remedies to which the facts may show the parties are entitled, whether legal or equitable."

Hence that case supports the position of appellant rather than appellee.

In *Hapgood v. Berry, supra,* the court, in listing the questions which it was considering (157 Fed. at 811), did not even include the one involved here. The *Hapgood* case involved a complex series of realty transactions between the parties over a period of many years. The parties were in a fiduciary relationship and one of them held title to property in trust for certain purposes. Of course, it is not surprising that in such a situation the court would find there was an adequate basis for awarding equitable relief, but it is equally clear that the *Hapgood* case has no bearing on the present inquiry. Here the appellant's cause of action, as framed by the pleadings, is primarily and simply one to recover damages arising out of a breach of contract.

Appellee suggests that in determining whether a proceeding is legal or equitable, the courts are not bound by the pleadings or the form of action, but it is to be noted that appellee suggests nothing apart from the pleadings or form of action which indicates that the action here is not one at law in both form and substance.

The procedural insufficiency noted by appellee (Appellee's Br. pp. 3-4) has been corrected by the entry of a formal order on April 11, 1956. A supplement to the printed record including this order and appropriate Notice of Appeal is in the process of transmission to the Court.

ARGUMENT.

I.

The Contract of the Parties Does Not Evidence a Transaction Involving Interstate Commerce.

Turning from jurisdiction to the merits of the present controversy, we suggest that appellee has failed in its attempts to explain away the arguments presented in appellant's opening brief which demonstrate that the contract involved here does not evidence a transaction involving interstate commerce.

Appellee's assertion that the present contract involves the production and distribution of motion pictures is untenable. While it is true that the price received by appellant for his sale of rights to appellee would be measured by the amount of profit arising from appellee's production and distribution of a motion picture based on those rights, such a method of computing price in no way alters the fact that *the only transaction involved in the contract* between appellant and appellee was *a sale of rights* in certain literary property. In short, appellee fails to show wherein the caption of the document in question, "Agreement of Sale," fails to evidence the true nature of the transaction.

The contention that the interstate character of many of appellee's other activities stamps the present contract as one evidencing a transaction involving interstate commerce, is likewise without merit. Reduced to a syllogism, appellee's argument appears to be the following:

> *Major Premise:* Appellee is engaged in interstate commerce in connection with the production and distribution of motion pictures.

Minor Premise: The instant contract is one to which appellee is a party.

Conclusion: The instant contract evidences a transaction involving interstate commerce.

Thus, stripped of its casuistry, appellee's argument reveals itself as a patent *non sequitur.*

The crucial point is that for purposes of determining the applicability of the Federal Arbitration Act, it is necessary to determine not merely whether either or both the parties to the contract are engaged in interstate activities, but rather whether the very *transaction evidenced by the contract in question* (in the present case a sale of rights in literary property) does itself involve interstate commerce. The answer to this question in the present case, we submit, must be emphatically in the negative.

Neither *United States v. Schubert,* 348 U. S. 222 (1955), nor *Binderup v. Pathe Exchange,* 263 U. S. 291 (1923), cited by appellee, are in point here. In the *Schubert* case, *supra,* the Court, in considering an antitrust action against a theatrical organization whose activities were nationwide in character, referred only to the production, distribution and exhibition of motion pictures and not to a sale of motion picture rights such as are involved here. Moreover, in the passage quoted, the Court was concerned with the meaning of "trade or commerce" rather than with whether that trade or commerce was local or interstate in character, for it was the former rather than the latter problem which posed the crucial question in the *Schubert* case.

The activities involved in the *Binderup* case, *supra,* as indicated in the passage cited by appellee itself, were

clearly interstate. They "consisted of manufacturing the commodity in one state, finding customers for it in other states, making contracts of lease with them, and transporting the commodity leased from the state of manufacture into the states of the lessees." We have no quarrel with the Court's finding of interstate commerce under those circumstances, but that is hardly the type of activity involved here.

Appellee devotes considerable attention to the opinion of the United States Supreme Court in *Mandeville Island Farms v. American Crystal Sugar Co.,* 334 U. S. 219 (1948), which, like the *Schubert* case, *supra,* was an anti-trust action, in this case one arising out of an agreement between California sugar refiners selling in interstate commerce to pay a uniform price for beets purchased in California. The Court there held (applying the "Shreveport doctrine") that even though the individual purchases involved might be intrastate in character, their over-all effect under the agreement would have a serious impact upon interstate commerce and therefore such local purchases might be subjected to Congressional regulation in the interest of protecting the national economy from such restraints of trade.[1] While we do not question the power

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[1]The language of the Court would indicate that the activities there involved intrastate commerce, for the Court stated at page 234:

"In view of this evolution, the inquiry whether the restraint occurs in one phase or another, interstate or intrastate, of the total economic process is now merely a preliminary step, except for those situations in which no aspect of or substantial effect upon interstate commerce can be found in the sum of the facts presented. For, given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate commerce, the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared

of Congress, in furtherance of a broad regulatory scheme, to curtail intrastate activities affecting interstate commerce where the control of such intrastate activities is required to make effective the attempt at interstate regulation, we submit that this is hardly the type of problem involved in the present case, which concerns the applicability of the federal arbitration mechanism to an isolated local sale of literary property.

Appellee states:

> "The modern legal doctrine of commerce applicable to industries, such as the motion picture industry, which embrace production, distribution and marketing activities, must not yield to decisions of yesteryear, cited by appellant, which hold that a grocery store or gas station may not be in interstate commerce."[2] (Appellee's Br. pp. 10-11.)

We believe that this statement epitomizes appellee's misconception of the present contract.

The question here is not, as appellee suggests, the nature of the motion picture industry,[3] but rather the

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in the Act's terms to constitute a forbidden consequence. If so, the restraint must fall, and the injuries it inflicts upon others become remediable under the Act's prescribed methods, including the treble damage provision.

"The Shreveport doctrine did not contemplate that restraints or burdens become or remain immune merely because they take place as events prior to the point in time when interstate commerce begins. Exactly the contrary is comprehended, for it is the effect upon that commerce, not the moment when its cause arises, which the doctrine was fashioned to reach."

[2]It should be noted that these decisions of "yesteryear", cited by appellant, were rendered in 1939 and 1950, respectively.

[3]The interstate activities of the motion picture industry are hardly more impressive than those of the petroleum industry, which was involved in the *Spencer* case, *infra,* apparently the "gas station" case referred to on page 11 of appellee's brief.

nature of the transaction involved here, namely, a sale of motion picture rights in literary property. As to the nature of those rights, we submit that the following language from *Spencer v. Sun Oil Co.,* 94 Fed. Supp. 408 (D. Conn., 1950), quoted in appellant's opening brief, is peculiarly appropriate:

> ". . . it would seem that what would otherwise be a purely intrastate transaction cannot be transformed into a transaction in interstate commerce merely because the commodity sold is taken by the purchaser across state lines and used in another state."

In the present case, the subject of sale is even further removed from interstate commerce, for it is *not the rights sold* (which are the subject matter of the contract in question) but rather a motion picture subsequently to be made from their exercise that is to be taken into the stream of interstate commerce.

Appellee stresses the fact that the Federal Arbitration Act refers to contracts evidencing transactions "involving" commerce rather than transactions "in" commerce, and suggests that Congress must have intended to include all contracts "affecting" commerce. Obviously this conclusion does not follow. Had Congress intended to cover all transactions "affecting" commerce, it undoubtedly would have said so in plain terms, as it has done in other statutes where it so intended. The reason for Congress' failure to include all transactions "affecting" interstate commerce within the scope of the Federal Arbitration Act is manifest. Here the Legislature was not concerned with a vast regulatory scheme, the execution of which might require the curtailment of intrastate activities. Rather, Congress was merely attempting to devise a suitable

arbitration procedure for interstate transactions. Any suggestion that the Act's coverage is not so limited has been put to rest by the recent decision of the United States Supreme Court in *Bernhardt v. Polygraphic Co.,* 350 U. S. 198 (1956), discussed in appellant's opening brief.

Culver v. Kurn, 354 Mo. 1158, 193 S. W. 2d 602 (1946), cited in support of appellee's attempt to equate "involving" with "affecting", concerned a purported railroad rule whereby the employment of a worker was said to be automatically terminated when the employee was "involved in an accident." The court, in pointing out that all the employees involved in a given accident had not been so treated, made the statement quoted (out of context) by appellee. In view of the vast difference in the provisions being interpreted, we fail to see how the *Kurn* case, *supra,* sheds any appreciable light on the issues raised in this appeal.

Petition of Prouvost Lefebvre, 105 Fed. Supp. 757 (S. D. N. Y., 1952), and *Wilson & Co. v. Fremont Cake & Meal Co., 77* Fed. Supp. 364 (D. Neb., 1948), which are cited by appellee as indicating a trend toward a broad view of commerce under the Arbitration Act, are clearly distinguishable from the instant case. The *Lefebvre* case, *supra,* involved interstate negotiations culminating in an interstate sale of wool between a buyer and seller whose plants were located in different states. No such transaction is involved here.

Wilson & Co. v. Fremont Cake & Meal Co., supra, involved a sale of soy bean oil which was to be shipped from the seller in Nebraska to the buyer in Illinois—obviously a transaction involving interstate commerce. It should

be noted that the court in the *Wilson* case, *supra,* did not even regard the Federal Arbitration Act as limited to contracts involving interstate commerce, so that the "trend," if any, which it represents, has since been repudiated by the United States Supreme Court. (*Bernhardt v. Polygraphic Co., supra.*)

II.

The Instant Case Is Not an Agreement for Arbitration Under California Law, and Therefore the California Courts Would Not Grant a Stay Here.

Appellee acknowledges that, assuming the instant contract does not involve interstate commerce under the Federal Arbitration Act, the issue is whether the contract is an agreement for arbitration under California law. In discussing this point, appellee injects certain extraneous elements which tend to confuse the real problems involved.

Appellee's references to the allegations in appellant's complaint have no bearing whatever on Point II of appellant's opening brief (to which appellee's Point II apparently is intended to correspond) which is concerned solely with the nature of the *contract* in question and not with the nature of the *dispute* which has arisen under it.[4]

Appellee injects further confusion into this problem by failing to differentiate the two types of arbitration referred to in Sections 1280 and 1281 of the *California Code of Civil Procedure,* namely; (1) "a provision in a written

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[4]In fact, in Point III of appellant's opening brief it is contended that none of the issues in this action are covered by the "arbitration provisions" of the contract.

contract to settle by arbitration a controversy thereafter arising out of the contract or the refusal to perform the whole or any part thereof, . . ." and (2) "an agreement in writing to submit an existing controversy to arbitration pursuant to section 1281 of this code, . . .". The present proceeding involves only the first type of arbitration agreement, and therefore the 1927 amendment to Section 1281 (which deals solely with arbitration of existing controversies), to which appellee purports to attach considerable weight, can have no bearing here.

Appellee contends that the fact that Section 1281, prior to the 1927 amendment, referred to controversies "which might be the subject of a civil action" served as the basis of *Rives-Strong Building v. Bank of America,* 50 Cal. App. 2d 810, 123 P. 2d 942 (1942); *Thompson v. Newman,* 36 Cal. App. 248, 171 Pac. 982 (1918),[5] and similar cases.[6] But it is significant that in *Rives-Strong, supra,* which was decided long after the 1927 amendment, the court took pains to minimize the importance of the 1927 amendment in regard to the problems under consideration there, stating at pages 813-814:

> "It should be noted that the provisions of the Code of Civil Procedure governing this subject have undergone substantial change since the making of the lease,

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[5]*Thompson v. Newman, supra,* is cited in appellant's opening brief for the proposition that the substance of an agreement rather than the use of such terms as "arbitration" are determinative as to whether the agreement is one for arbitration. Surely appellee cannot conscientiously quarrel with that proposition.

[6]It is submitted that the *Rives-Strong* case, *supra,* and similar cases cited by appellant, did not take the doctrinaire approach attributed to them by appellee, but turned rather on a comprehensive analysis of the underlying problems involved, as pointed out in appellant's opening brief.

> and the latter should be construed in the light of the statute as it existed at that time, notwithstanding the subsequent modification which in no way affected the provision now under consideration. However, in the view we take of it this does not assume the importance accorded it in the briefs."

The holding in *Cathcart v. Security Title etc. Co.,* 66 Cal. App. 2d 469, 152 P. 2d 336 (1944), cited by appellee, in no wise weakens the authority of the *Rives-Strong* line of cases.[7] The *Cathcart* case, *supra,* involved an order removing an arbitrator and appointing a substitute arbitrator. The court held that the appellant, having asked the court to enforce the arbitration agreement, was in no position to challenge the court's action on the grounds urged. In this connection the court stated at page 473:

> ". . . The appellant submitted the entire matter to the court, in effect asked the court to enforce the arbitration agreement, the court acted upon the issues presented, and the appellant is in no position to complain that her request was granted. The order appealed from was made for the purpose of carrying out and enforcing a judgment already entered in this equitable action and we think that under any point of view it was well within the court's powers . . ."[8]

Appellee's contention that the proceeding in the instant case is intended to deal with a matter as to which a civil

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[7]It should be noted that unlike the *Rives-Strong* case, which has been frequently cited by subsequent authorities, no case to date has cited the *Cathcart* case, *supra.*

[8]The *Cathcart* case, *supra,* involved an existing dispute under Section 1281, which, as pointed out above, is not the type of problem with which we are here concerned.

action could be and has been filed, combines two basic errors. First of all, the reference to the filing of a civil action in the pre-1927 version of Section 1281 of the *Code of Civil Procedure* could hardly be said to furnish a complete touchstone for the present proceeding; rather, the applicability of the statute must be determined from an analysis of the nature of the "arbitration provisions" in the contract under consideration, as was done in appellant's opening brief. Secondly, as pointed out earlier in this discussion, the subject matter of the *present dispute* cannot be relied upon to determine the nature of the *contract's* "arbitration" provisions.

In referring to appellant's analysis of the present contract in terms of California law, appellee distorts that claim to a point where it is unrecognizable. Appellant relied, not upon the fact that the "arbitration clause" provided for the presentation of the dispute to the arbitrators in writing rather than orally, but rather upon the absence of such indicia of arbitration as a hearing, cross-examination, and a determination based on the evidence presented by the parties.

Appellee's contention that arbitrators may secure advice and information independently misses the point of appellant's analysis, which was not concerned with the propriety of securing such advice in a proceeding which admittedly involved arbitration, but rather with the fact that the contract's express authorization for securing such advice, together with various other factors, indicates that arbitration proceedings of the type governed by the California statute were not contemplated in the present contract. Both of the authorities cited by appellee (*Bern-*

hardt v. Polygraphic Co., supra, and *Griffith Co. v. San Diego College for Women,* 45 A. C. 528, 534, 289 P. 2d 476 (1955)) involved the scope of permissible activity of arbitrators *assuming the existence of arbitration proceedings.* Thus, in *Griffith Co. v. San Diego College for Women, supra,* the court was concerned with an attempt to vacate an arbitrator's award based on alleged misconduct by an arbitrator in securing outside information. When the portion of the passage from the *Griffith* case [quoted from *Sapp v. Barenfeld,* 34 Cal. 2d 515, 212 P. 2d 233 (1949)] cited at page 16 of appellee's brief, is placed in the context in which it appeared in the *Griffith* opinion, it will be seen that the *Griffith* case and the *Sapp* case not only fail to support appellee's position, but actually support appellant's position. In this regard the court stated at page 534:

> " 'There is no error in such procedure. *Although a hearing is required on disputed questions of fact,* arbitrators may inform themselves further by privately consulting price lists, examining materials and receiving cost estimates. (Sturges, Commercial Arbitration and Awards, §217, p. 495.) This procedure may be *ex parte,* without notice or hearing to the parties, for 'it is entirely proper for arbitrators, in a case requiring it, to obtain from disinterested persons of acknowledged skill such information and advice in reference to technical questions submitted to them, as may be necessary to enable them to come to correct conclusions; provided that the award is the result of their own judgment after obtaining such information. . . .' " (Citing *Rives-Strong, supra,* and other cases; Emphasis added.)

Thus the passage taken in its entirety and in context illustrates, first, the necessity for a hearing on disputed fact questions in connection with arbitration proceedings, and secondly, the continued vitality of the *Rives-Strong* decision. Absent a hearing there is no arbitration within the sense of the California Statute.

Finally, it should be noted that appellant does not contend, as appellee indicates, that the present proceeding involves "valuation" matters. Rather, appellant has stated

> ". . . that the only question to be submitted to the certified public accountants was that of the accuracy of the accounting or, stated otherwise, the purely ministerial, non-judicial task of inquiring into the correctness of the accounting from sound accounting principles. . . ."

In short, we believe that the only adequate approach to the problem of determining whether the contract in the instant case involves arbitration under California law is to analyze the cases to determine the factors which are regarded by the courts as determinative of whether or not a given procedure is arbitration and then apply those factors to the contract involved. This was the approach adopted in appellant's opening brief, and we submit that it is far more enlightening than appellee's method of setting up and tearing down "catch words."

III.

None of the Issues Tendered in the Complaint Are Referable to Arbitration Under the Agreement.

Appellee's argument that the issues tendered in the complaint are referable to arbitration under the contract is premised on the unfounded assumption that those issues involve mere matters of classification for accounting purposes. Actually, the issues involve a series of contractual breaches by appellee in connection with which the complex legal principles for determining whether a breach exists, the nature of the breach, possible excuses for the breach, etc., are brought into play. This is obviously a far different problem than that of determining whether a given item should be classified in a particular manner for accounting purposes. In short, the distinction to be drawn is not, as appellee suggests, between matters of bookkeeping and matters of accounting, but rather the significant difference between matters of accounting, as covered by the terms of the agreement, and complex questions of law, as are involved in the present action.

Pacific Indemnity Co. v. Insurance Co. of North America, 25 F. 2d 930 (C. C. A. 9, 1928), cited by appellee, is out of point in the present context. The question involved in *Pacific Indemnity Co., supra,* was the scope of the state arbitration law, not the scope of a particular agreement. In fact, the arbitration clause in that case referred to "any difference hereinafter arising between the contracting parties with reference to *any transaction under this agreement* . . ." (emphasis added), a provision which is in striking contrast to the narrowly worded "arbitration clause" in the present contract, which is limited to controversies *"as to any accounting* by Pur-

chaser with respect to the share of Pictures in the net profits of the picture."

We have no quarrel with appellee's suggestion that the language of the present contract indicates that the parties foresaw the possibility of accounting controversies and sought to make provision for such controversies in their contract. But the point which appellee overlooks is that *no such accounting controversy is involved here.*

IV.

Appellee Is in Default in Proceeding With Arbitration.

Appellant will rely on his presentation of this issue in his opening brief.

Conclusion.

Appellee has attempted to becloud the issues involved in this appeal by giving labels of its own choosing to appellant's contentions, and then assaulting the straw men it has thus created. Appellee has compounded this confusion by failing to differentiate the several distinct problems involved in this appeal. Thus, in answer to appellant's demonstration that the isolated local sales *transaction* involved here does not come within the scope of the Federal Arbitration Act, appellee speaks of the motion picture *industry* and quotes a few random phrases from the contract out of context.

In answer to appellant's analysis of the *contract* to show that it does not contain provisions for arbitration, as that term is defined by the California authorities, appellee creates and attacks the label "valuation" and speaks in terms of the issues raised by the *complaint* in the present action, rather than in terms of the *contract.*

In answer to appellant's contention that the present action involves issues of law not within the scope of the "accounting" provisions of the contract, appellee creates the label "classification" and extols the virtues of accountancy. We suggest that when the confusion thus created by appellee's brief is removed, it will be seen that appellee has in no wise impaired the validity of appellant's contentions.

Respectfully submitted,

PACHT, ROSS, WARNE & BERNHARD,

By ISAAC PACHT,

STUART L. KADISON,

HARVEY M. GROSSMAN,

Attorneys for Appellant.

No. 15042

United States Court of Appeals

for the Ninth Circuit

SEATTLE ASSOCIATION OF CREDIT MEN, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington, Northern Division.

FILED

APR 24 1956

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. 4-13-56

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

CROSEN, JOHNSON & WHEELON,
900 United Pacific Building,
Seattle 4, Washington,

Attorneys for Appellant.

CHARLES H. RICE,
Assistant United States Attorney General;

LEE A. JACKSON,
Attorney,
Department of Justice, Washington 25, D. C.;

CHARLES P. MORIARTY,
1020 U. S. Court House,
Seattle 4, Washington;

THOMAS R. WINTER,
223 U. S. Court House,
Seattle 4, Washington,

Attorneys for Appellee.

In the District Court of the United States for the Western District of Washington, Northern Division

No. 3992

SEATTLE ASSOCIATION OF CREDIT MEN, a Corporation,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Plaintiff complains against the defendant as follows:

I.

Plaintiff is a non-profit corporation organized and existing under the laws of the State of Washington and engaged in the business of representing unsecured creditors in credit extensions granted to business enterprises through the medium of trust mortgages. Plaintiff operates in the State of Washington and the Territory of Alaska and has its principal offices in Seattle, Washington. Plaintiff brings this action on its own behalf and on behalf of creditors secured by the hereinafter-referred-to chattel mortgage in trust.

II.

That the defendant, United States of America, is a corporation sovereign and body politic.

III.

Jurisdiction is founded on the existence of a federal question and amount in controversy. The action arises under the Internal Revenue Laws of the United States, 26 U. S. C., §§ 6321, 6323, 6331, and 6332. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00. Jurisdiction is also founded on 28 U. S. C., §2410.

IV.

Western Appliance Co., Inc., at all times herein mentioned, was a corporation organized and exiting under the laws of the State of Washington with offices is Seattle, Washington. On July 1, 1952, while solvent, but unable to pay all of its bills in the ordinary course of business, Western Appliance Co., Inc., at the request of its unsecured creditors, made and executed to the plaintiff a chattel mortgage in trust for the purpose of securing an extension of time within which to pay its existing unsecured liabilities. That said mortgage, a copy of which is attached, marked "Exhibit A," and by reference thereto made a part hereof, was duly recorded with the Auditor of King County under file No. 2860934, receiving No. 4251205, on the third day of July, 1952. That said chattel mortgage was given as security for the payment of a promissory note for $22,000.00, dated July 1, 1952. That at the same time plaintiff took from said corporation an assignment of accounts receivable, a copy of which is attached, marked "Exhibit B" and by reference made a part hereof, notice of which was

duly given to the Secretary of State on or about July 1, 1952.

V.

That at the time of the execution of said trust mortgage, Western Appliance Co., Inc., was indebted to the United States in the sum of $149.54 for F.U.T.A. taxes, which sum has since been abated to $21.04. Plaintiff admits that the latter sum of $21.04 is due and owing to the United States as a claim entitled to priority out of the proceeds of the assets covered by said chattel mortgage in trust.

VI.

On June 2, 1953, Western Appliance Co., Inc., being then insolvent, found itself unable to make the payments under said note and trust mortgage and offered to, and executed, in favor of the plaintiff, a bill of sale to all of the assets covered by said mortgage, in lieu of foreclosure thereof, which Bill of Sale was recorded on June 5, 1953, with the Auditor of King County under Receiving No. 4351859. That a copy of said bill of sale is attached hereto, marked "Exhibit C" and by reference made a part hereof.

VII.

On June 15, 1953, following a sale of said assets by the plaintiff, the District Director of internal Revenue, through his agents and employees, made a levy upon the plaintiff for WT-FICA taxes in the total sum of $1,632.29 due and owing by Western Appliance Co., Inc., for the quarter ending March 31, 1953, for which a lien had been filed by the

United States Government on June 15, 1953, being Lien No. 25778, in the amount of $1,339.55, plus penalties and interest. Demand was therewith made upon the plaintiff for the amount necessary to satisfy said taxes, all of which taxes accrued after July 1, 1952, date of said trust mortgage.

VIII.

Plaintiff made answer to said levy on July 16, 1953, setting forth funds in its possession in the amount of $4,176.37, admitting liability on the aforesaid F. U. T. A. tax as abated to the sum of $21.04 and setting forth the existence of the aforesaid trust mortgage.

IX.

At the time of the execution of said trust mortgage, Western Appliance Co., Inc., had been in the business of selling appliances on conditional sale contracts, which contracts were then, with full right or recourse assigned to the National Bank of Commerce, University Branch, Seattle, for collection. Said bank, as a part of said assignment, accumulated a portion of the proceeds of each contract into a fund called a "reserve fund" to secure the bank's contingent liabilities on said contracts. No accounts were assigned by Western Appliance Co., Inc., to said bank on or after the date of said trust mortgage.

X.

Plaintiff notified said bank of the existence of said trust mortgage on or about July 2, 1952, and of the assignment of accounts receivable. On March

27, 1953, Western Appliance Co., Inc., authorized said bank to pay the "reserve account" directly to the plaintiff. That a copy of said authorization is attached, marked "Exhibit D" and by reference made a part hereof. Thereafter said bank forwarded monthly reports to plaintiff on all contracts assigned by Western Appliance Co., Inc., to the bank, and where defaults occurred on said contracts, required the plaintiff to repurchase said contracts pursuant to the terms thereof, after which the plaintiff made its own collection on said contracts.

XI.

On June 18, 1953, the District Director of Internal Revenue, through his agents and employees, served on the University Branch of the National Bank of Commerce a levy for the same taxes secured by the same lien heretofore referred to, and on July 6, 1953, said bank made answer to said levy, denying that it held any money or property belonging to Western Appliance Co., Inc., and setting forth the interest of the plaintiff therein.

XII.

All of the contracts covered by said "reserve fund" have now been paid in full, and said bank no longer claims any interest therein and is ready to pay the proceeds to whomsoever may be entitled to them, but has refused to pay said proceeds to the plaintiff because of said levy. Said proceeds now amount to $472.68 in cash and two U. S. Treasury Bonds in the face amount of $1,000.00 each.

XIII.

Plaintiff, through its attorneys, has on numerous occasions requested the District Director of Internal Revenue and his civil advisory counsel to release said levies, but on each and every occasion the District Director of Internal Revenue and/or his counsel have refused to do so despite the fact that Western Appliance Co., Inc., has no interest whatsoever in any of the funds hereinabove referred to.

XIV.

In connection with said trust mortgage numerous claims were filed with the plaintiff on behalf of the unsecured creditors of Western Appliance Co., Inc., existing as of July 1, 1952. The total amount of those claims is $21,404.85. To date, said creditors have received on said claims the sum of $2,140.50, and the plaintiff has on hand, not including funds now in the possession of the National Bank of Commerce, University Branch, the sum of $2,528.06 with which to pay a final dividend to creditors. More than a year has expired since said levies, and the plaintiff has been unable to make any further distribution to said creditors.

XV.

None of the moneys in the hands of the plaintiff, or in the possession of said bank, but belonging to the plaintiff, are moneys of Western Appliance Co., Inc., but because of said levies, plaintiff has been prohibited for more than one year from disposing

of said moneys and will continue to be prohibited unless said levies are released or disposed of.

XVI.

That said levies constitute a cloud upon the title of the plaintiff to the funds in the plaintiff's hands and in the hands of the University Branch of the National Bank of Commerce. That defendant has made no effort to seize the property in the hands of the plaintiff and the National Bank of Commerce nor made any attempt to collect the tax underlying said levies, and has consistently refused to permit the plaintiff to adjudicate the question of plaintiff's right to said funds.

Wherefore, plaintiff prays as follows:

(1) That plaintiff's title to the aforesaid funds in its hands and in the hands of the National Bank of Commerce be quieted, and the cloud of the United States of America occasioned by levies against said funds be removed.

/s/ WILLARD HATCH,

CROSON, JOHNSON & WHEELON,

Attorneys for Plaintiff.

EXHIBIT A

Chattel Mortgage in Trust

This Indenture, made this 1st day of July A. D. 1952, by Western Appliance Co., Inc., a Corporation, doing business at 6601 Roosevelt Way, in the city of Seattle, County of King, State of Washington, Mortgagor to the Seattle Association of Credit Men, a Washington Corporation, of Seattle, King County, Washington, Mortgagee, Witnesseth:

Whereas, said mortgagor desires to obtain an extension of time in which to pay the claims and demands of its creditors, a list of which creditors is herewith furnished to said mortgagee, showing the amounts respectively due and owing to said creditors by said mortgagor; and,

Whereas, said mortgagee is willing to take a mortgage from said mortgagor on all its property of every kind and description as security for the payment by said mortgagor to said mortgagee of the sum of Twenty-two Thousand and No/100 ($22,000.00) Dollars in the manner hereinafter provided for, to apply on each and every bona fide creditor's claim filed with said mortgagee, equally and ratably, and without preference, and whether or not said creditor may have been mentioned in said list furnished to said mortgagee.

Now therefore, the said mortgagor, in consideration of the premises, and of the covenants hereinafter contained, and of the sum of One ($1.00) Dollar, to it in hand paid by said mortgagee, and other valuable considerations, the receipt whereof

is hereby acknowledged, has, for the purpose of securing the payment of said claims and debts, represented as aggregating the said sum of Twenty-two Thousand and No/100 ($22,000.00) Dollars, granted, bargained, sold and mortgaged, and by these presents does grant, bargain, sell and mortgage unto the said mortgagee, its successors and assigns, the following described personal property, to wit;

All that certain stock of goods, wares and merchandise* (see reverse side) together with all good will incident to the business, all routes, customer lists, patents and patent rights and trade-marks and all personal property of every kind and description used in, about and as a part of the business of said mortgagor,

and whether or not the same is contained or used in or about the premises above described, including among other things those certain fixtures, furniture, tools, appliances, machinery and equipment and automobiles more specifically described in an itemized list attached hereto marked Exhibit "A" and made a part hereof, which list shall not be considered as excluding any other item of property covered by the general description in this paragraph; wheresoever located;

and all books of account, and accounts and notes, contracted and to be contracted from the sale of the

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*Consisting principally of radios, television sets electrical appliances, parts and supplies, etc.,

above goods, wares and merchandise and additions thereto, the same having been assigned by a separate instrument in writing; and all cash now on hand, deposited in bank, or hereafter acquired;

together with all goods, wares and merchandise furniture and fixtures, tools and appliances, machinery and equipment, and automobiles, which may be added to and incorporated or mixed with the same by said mortgagor, and whether or not such items are renewals, repairs, replacements, or a complete substitution therefor;

and said mortgagor does hereby certify that it is the true and lawful owner of said property, that the same is now in its possession, and is principally located at and in or about that certain building or storeroom known as 6601 Roosevelt Way, City of Seattle, County of King, and State of Washington; that it has the right to mortgage, sell and transfer the same, and that the said property is free and clear from all encumbrances except the following: Valid subsisting liens and encumbrances of record.

To Have and to Hold, all and singular, the personal property aforesaid forever, but in trust, nevertheless, for the use and benefit of the present unsecured creditors of said mortgagor, subject to the terms, conditions, provisions and stipulations hereinafter set forth; provided, always, and these presents are upon the express condition, that if the

said mortgagor shall pay or cause to be paid unto the said mortgagee, its successors or assigns, the sum of Twenty-two Thousand and No/100 ($22,000.00) Dollars, with interest at the rate of 6 per cent per annum from date hereof until paid, according to the conditions of one certain promissory note of even date herewith made payable in instalments, on demand, or at a date certain to said mortgagee, with interest as set forth above, then these presents to be void and of no effect.

It is Further Hereby Mutually Agreed by and between the parties hereto as follows, to wit:

First: That until the total indebtedness secured by this mortgage is fully paid and satisfied, said mortgagor shall pay unto the said mortgagee from the proceeds of the sales of said goods, wares and merchandise herein mortgaged, together with all amounts collected from accounts receivable, the net balance remaining after deducting the necessary expenses of operating the business of said mortgagor and the purchase of new merchandise stock for cash sufficient for the needs of said business; and for the above purpose a true and correct accounting** shall be had between said mortgagor and said mortgagee on or before the 15th day of each and every month during the life of this mortgage of the proceeds of said business for the preceding month, but in no event shall the payments made under said accounting be less than the sum of Five Hundred

*Commencing September 1, 1952.

**In writing.

and No/100 ($500.00) Dollars,* the same to be credited on said note in accordance with its terms, any excess, however, to be credited on the last payment due on said note.

Second: That if the claims against said mortgagor filed hereunder with said mortgagee exceed the sum of $22,000.00 together with interest, and expenses as hereinafter provided for the said mortgagor agree to pay such amount in excess of $22,000.00 before this mortgage will be void and of no effect; but in the event that such amount is less than $22,000.00, the difference between such amount and $22,000.00, shall be credited as a final payment on said note and mortgage.

Third: That at the option of the mortgagee it may select the manager, bookkeeper, clerk or cashier of the business of said mortgagor to take charge of its finances, accounts and books of record his reasonable wages to be paid to him, the same as other employees of the business; that said mortgagee may further, at its option by its agents or officers, take charge of, supervise and control the business of said mortgagor in any manner it may deem best to secure the claims of creditors, as security for which this mortgage is given.

Fourth: That said mortgagee shall first deduct from the funds derived from this mortgage its necessary expenses of administering its trust hereunder, together with a reasonable compensation, which is

hereby declared to be the sum of ten (10%) per cent of all moneys paid to it under this mortgage; provided however that a minimum compensation of Seven Hundred Fifty and No/100 ($750.00) Dollars shall be retained in the event of compromise settlement or receipt of less than the full amount of this mortgage, and the balance of all moneys coming into its hands under this mortgage shall be paid equally and ratably to the present unsecured creditors whose claims have been or hereafter shall be filed with said mortgagee, or proven to its satisfaction, but no person or persons or corporation having an obligation or charge against the mortgagor subsequent to the date hereof shall be permitted to participate as a creditor under this mortgage. *(See reverse side for remainder of this paragraph.)

Fifth: That said mortgagor agrees to insure said property against loss by fire for its full value up to the amount of the mortgagee's interest under this mortgage, pay the premiums therefor, and deliver the policies to the mortgagee; said mortgagor further agree to pay all taxes and claims, or charges for rent or labor, which could become a lien against said property and take precedence over this mortgage; and in the event that said mortgagor fails, neglects, or refuses to pay any of the items set

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*To the extent of such subsequent obligations: Provided further, that one-half of the mortgagee's compensation hereunder shall be paid by the mortgagor, and one-half shall be paid by the creditors who are the beneficiaries hereunder.

forth above in this paragraph as and when they become due, the mortgagee at its option may pay the same and the amount thereof shall be added to the amount due otherwise under this mortgage with like interest thereon.

Sixth: That as long as the conditions of this mortgage are fulfilled, the said mortgagor is to remain in peaceful possession of said property, and in consideration thereof agrees to keep said property in as good condition as it now is, reasonable wear and tear excepted.

Seventh: That if default shall be made in the payment of any sum of money due under said periodical accounting, or of any installment due on said note, or any portion of the principal thereof, or any of them, when and as the same becomes due and payable, or in any of the covenants and agreements hereinabove contained, or if any attempt shall be made to remove, dispose of, injure or abandon said property, or any part thereof, by said mortgagor, or any other person, or if said mortgagee shall at any time deem itself not secure, then, thereupon and thereafter, it shall be lawful, and the said mortgagor hereby authorizes the said mortgagee, its assigns, or authorized agents, to take possession of said property wherever the same may be found, with or without process of law and sell and dispose of the same and all equity of redemption at public or private sale and with or without notice as provided by law, and on such terms as said mortgagee, its successors, assigns, or

agents may see fit, retaining such amount as shall pay the aforesaid note and interest thereon, also a reasonable attorney's fee and such other expenses as may have been incurred, together with the compensation of said mortgagee, returning the surplus money, if any there be, to the said mortgagor, its successors or assigns.

In the event of the sale of any part, portion or all of the assets covered by this mortgage by the person, firm or corporation having title thereto subject to this mortgage, the mortgagee shall have full power and authority to consent to said sale, and satisfy this mortgage, and accept in place and stead of the said mortgage, such consideration as in the judgment of the mortgagee shall be wise and for the best interests of the beneficiaries under this mortgage.

In case of foreclosure of said mortgage, it is agreed that the venue of said action may be laid in King County, State of Washington, and that the mortgagee herein may become the purchaser at such foreclosure sale and in the event of its purchase at said sale, mortgagee herein shall have the right, power and authority to sell, handle, manage or in any other way or manner dispose of the property purchased at such foreclosure sale, on such terms as in the judgment of the mortgagee may seem wise for the use and benefit of and the protection of the beneficiaries under this mortgage; and in the event of the acquiring of title by the mortgagee of the property covered by this mortgage by means other

than foreclosure, the mortgagee shall have the same right, power and authority to sell, handle, manage or in any other way or manner dispose of the property for the use and benefit of the beneficiaries under this mortgage as though title had been secured by and through foreclosure sale.

In witness whereof, the said mortgagor has caused this instrument to be executed and its corporate seal attached by its officers thereunto duly authorized, the day and year first above written.

WESTERN APPLIANCE CO., INC.

By /s/ FRED BRICKLEY,
President.

Attest:

/s/ MARJORIE L. CARLSON,
Secretary.

State of Washington
County of King—ss.

Fred Brickley and Marjorie L. Carlson, the President and Secretary respectively of the mortgagor corporation in the foregoing mortgage named, being first duly sworn, on oath depose and say: That the aforesaid mortgage is made in good faith and without any design to hinder, delay or defraud creditors, and that they are authorized to make this affidavit for and on behalf of said corporation.

/s/ MARJORIE L. CARLSON.
/s/ FRED BRICKLEY,

Subscribed and sworn to before me this 1st day of July, A.D. 1952.

[Seal] /s/ A. J. JACKSON,
Notary Public in and for the State of Washington,
Residing at Seattle.

State of Washington
County of King—ss.

This is to certify, that on this 1st day of July A.D. 19.., before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally came Fred Brickley and Marjorie L. Carlson to me known to be respectively the President and Secretary of the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

Witness my hand and official seal, the day and year in this certificate first above written.

/s/ A. J. JACKSON,
Notary Public in and for the State of Washington,
Residing at Seattle.

Exhibit "A"

Western Appliance Co., Inc.

Auditor Note—Exhibit "A" to Be Filed but Not Recorded

Office Equipment

1 Only—Corona adding machine #KA85376
1 R. C. Allen cash register Mod. 200N #1048480
1 F & E Check Protector #2942060
1 3 Drawer file cabinet (wood)
1 Uarco receipt register
1 Single pedestal desk, oak 32" x 42"
1 Double " " " 30½" x 50"
1 " " " " 36" x 60"
3 Desk lamps, fluorescent
1 Desk, single pedestal, 32" x 42" oak
2 Chairs, swivel type, oak
2 " straight back
1 Counter, display half oval 72" long
1 Intercommunication set, 4 station Masco

Shop Tools & Equipment

1 Only—Baldor bench grinder #3107
1 Emerson grinder & buffer #X01260
1 Automatic refrigerator drier #2200
2 Bench Vises—1 Craftsman—1 Brker
2 National Oxygen gauges
1 Victor Nitrogen "
1 Oxyweld cutting torch #100

1		Greon charging rack (Kerotest)
1	Lot	Hand Tools
2	Only	Refrigerator hand trucks with straps
1		Armature growler
1		Refrigerator dolly
5		Wood work benches, 34" x 12'
1		JBT Iron Tester md 30J
1		Iron cooling fan
1		Thermocoupling (oven tester)
1		182-f service valve kit for hermetics
2		Purge pumps
1		Exhaust fan
3		Metal bench stools
2		Straight back chairs
1		Norge Hi-temp oil heater

Trucks

1	Only	International Truck, 1948 pickup Serial #KR2-58624, Motor #GAD 214217566
1		Dodge Truck, panel body 1946 Serial #9223421, Motor #T112-178282

EXHIBIT B

Assignment of Accounts and Notes Receivable
of Western Appliance Co., Inc.
Seattle, Wash.

For value received, the undersigned hereby sells, assigns, transfers and sets over unto the Seattle As-

sociation of Credit Men all existing conditional sale contracts, accounts and notes receivable of the business of said Western Appliance Co., Inc., together with all future conditional sale contracts, accounts and notes receivable accruing from the operation of said business, and agrees to forthwith compile a correct and true list of the same showing names, addresses and amounts due, and forward the same to said Seattle Association of Credit Men, together with all promissory notes evidencing the same, and make a corrected list thereof each month hereafter.

This assignment, however, is in trust for the benefit of the creditors of said Western Appliance Co., Inc., and is in conjunction with and ancillary to that certain mortgage in trust executed and delivered to the Seattle Association of Credit Men the .... day of ....., 1952, and the terms set forth in said trust mortgage are to govern as to distribution of the funds derived hereby.

Dated at Seattle, Washington, this 1st day of July, 1952.

WESTERN APPLIANCE CO., INC.

By /s/ FRED BRICKLEY,
President;

By /s/ MARJORIE L. CARLSON,
Secretary.

State of Washington
County of King—ss.

This is to certify, that on this 1st day of July, 1952, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared Fred Brickley and Marjorie L. Carlson, to me personally known to be the President and Secretary respectively of the corporation described in and which executed the foregoing instrument, and on oath stated, each for himself and not one for the other, that they executed the same as the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, that they were authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

/s/ A. J. JACKSON.
Notary Public in and for the State of Washington,
Residing at Seattle.

EXHIBIT C

Bill of Sale in Lieu of Foreclosure

Know All Men by These Presents:

That, whereas, on the 1st day of July, 1952, Western Appliance Co., Inc., a corporation, doing business at 6601 Roosevelt Way, in the City of Seattle,

County of King, State of Washington, did make, execute and deliver to the Seattle Association of Credit Men, a Washington corporation, of Seattle, Washington, a chattel mortgage in trust mortgaging:

> All that certain stock of goods, wares, and merchandise, together with all good will incident to the business, all routes, customer lists, patents and patent rights and trade marks, and all personal property of every kind and description used in, about and as a part of the business of said mortgagor, consisting principally of hardware, appliances, auto supplies, tires, etc., and whether or not the same is contained or used in or about the premises above described, including among other things those certain fixtures, furniture, tools, appliances, machinery and equipment and automobiles more specifically described in an itemized list attached to said Chattel Mortgage as Exhibit "A" and made a part thereof, which list did not exclude any other item of property covered by the general description in the said paragraph;
>
> Together with all books of account, and accounts and notes, contracted and to be contracted from the sale of the above goods, wares, and merchandise and additions thereto, the same having been assigned by a separate instrument in writing; and all cash now on hand, deposited in bank, or hereafter acquired;
>
> Together with all goods, wares, and merchandise, furniture and fixtures, tools and appli-

ances, machinery and equipment, and automobiles, which may be added to and incorporated or mixed with the same by said mortgagor, and whether or not such items are renewals, repairs, replacements, or a complete substitution therefor;

to secure the payment of one promissory note of Twenty-two Thousand Dollars ($22,000.00), as evidenced by Promissory Note dated July 1, 1952; and,

Whereas, said Chattel Mortgage in Trust, hereinbefore referred to, was filed of record in the Auditor's office of King County, Washington, under file No. 2860934, recording No. 4251205, on the 3rd day of July, 1952; and,

Whereas, said Western Appliance Co., Inc., is unable to make payments on said Promissory Note; and,

Whereas, Western Appliance Co., Inc., deems it advisable to avoid the additional costs and expense of foreclosure of said Chattel Mortgage; now, therefore,

The said Western Appliance Co., Inc., by its duly appointed officers, and pursuant to a corporate resolution, does hereby grant, bargain and sell all of the property and rights under the said Chattel Mortgage to Seattle Association of Credit Men, to be sold by said Seattle Association of Credit Men, the proceeds of which are to be applied on the obligations of Western Appliance Co., Inc., which have been filed with the Seattle Association of Credit Men

and which have a right to participate in the distribution of the proceeds under the terms of said Chattel Mortgage.

This Bill of Sale includes all items covered by the aforesaid Chattel Mortgage now located at 6601 Roosevelt Way, Seattle, Washington, a portion of said personal property being more specifically described in an itemized list attached to said Chattel Mortgage and marked Exhibit "A" and made a part hereof, which list shall not be considered as excluding any other items of property covered by the terms and conditions of said Chattel Mortgage.

In witness whereof, said Western Appliance Co., Inc., has executed this instrument this 2 day of June, 1953.

WESTERN APPLIANCE CO., INC.

By FRED BRICKLEY,
President,

By MARJORIE L. CARLSON,
Secretary.

State of Washington,
County of King—ss.

On this day personally appeared before me Fred Brickley and Marjorie L. Carlson, to me known to be the President and Secretary of the above-named corporation which executed the foregoing instrument, and acknowledged that said instrument was

the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

Given under my hand and official seal this 2 day June, 1953.

E. V. GRISVARD,
Notary Public in and for the State of Washington,
Residing at Seattle.

EXHIBIT D

WH:VC 9/28/54 (Copy)

Seattle Association of Credit Men
6th Flr. Marion Bldg.
Seattle 4, Washington

March 27, 1953

National Bank of Commerce
University Branch
1300 E. 45th St.
Seattle 5, Washington

Attention: Mr. Neuslander

Re: Western Appliance Co., Inc.

Gentlemen:

As you are aware the Seattle Association of Credit Men holds a Chattel Mortgage in trust on all of the assets of the above corporation which includes all

accounts and contracts receivable, subject of course to prior assignments to your bank on account of contracts pledged for loans.

In accordance with an agreement entered into this date between the officers of Western Appliance Co., Inc. and the members of the Creditors' Committee at a meeting held in our office, will you please note your records to the effect that when the contracts now in your possession have paid out, that the entire accumulated reserve is to be paid direct to the Seattle Association of Credit Men.

Please acknowledge receipt.

Yours very truly,

SEATTLE ASSOCIATION OF CREDIT MEN
As Trust Mortgagee of
Western Appliance Co., Inc.

/s/ B. K. COSBY,

By B. K. COSBY.

EVG:ji

We hereby agree to the foregoing.

WESTERN APPLIANCE CO., INC.

By /s/ FRED BRICKLEY,
President.

[Endorsed]: Filed August 19, 1955.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now The United States of America, defendant above named, by Charles P. Moriarty, United States Attorney for the Western District of Washington; Edward J. McCormick, Jr., Assistant United States Attorney for said district; and Thomas R. Winter, Special Assistant to the Regional Counsel, Internal Revenue Service, and moves to dismiss this action upon the following grounds:

1. That the plaintiff's complaint fails to state a cause of action upon which relief can be granted.

2. That the Court is without jurisdiction under Title 28, U.S.C.A., Sec. 2410, in that that section gives the Court jurisdiction over the United States in suits to quiet title, to foreclose a lien, etc., but does not give the Court jurisdiction over the United States in a suit to adjudicate a tax liability, which is the primary relief sought by the plaintiff, and that section can therefore not be invoked to give jurisdiction over the United States of a case in which jurisdiction is not otherwise granted.

3. That the Court is without jurisdiction in that the judgment and dismissal of the former action by the same plaintiff in the action entitled "Seattle Association of Credit Men, a corporation, Plaintiff, vs. William E. Frank, Director of Internal Revenue for the District of Alaska and Washington, and The United States of America, Defendants", Civil No.

1840, is res judicata of the present action. In support thereof, and attached hereto, is an affidavit of Thomas R. Winter, of counsel for the defendant.

/s/ CHARLES P. MORIARTY,
United States Attorney,

/s/ EDWARD J. McCORMICK, JR.,
Assistant United States
Attorney,

/s/ THOMAS R. WINTER,
Special Assistant to the Regional Counsel Internal Revenue Service.

Receipt of copy acknowledged.

[Endorsed]: Filed November 14, 1955.

[Title of District Court and Cause.]

MEMORANDUM DECISION

A reading of Title 28 §2410 in entirety makes it plain that the consent to suit by the United States referred to in the section is limited to situations involving judicial sales. Adler v. Nicholas, 166 F.2d 674 (10 Cir. 1948) holds otherwise but Integrity Trust Co. v. U.S., 3 F. Supp. 577; Borough of Kenilworth v. Corwine, 96 F. Supp. 69; Miners Sav. Bank of Pittston, Pa. v. U.S., 110 F Supp. 563; Metropolitan Life Ins. Co. v. U.S., 107, F.2d 311; and Bank of America Nat. Trust & Sav. Ass'n. v. U.S., 84 F. Supp. 387 are to the contrary. The latter

cases appear to be more consistent with the language of the statute and its legislative history.

The action must be dismissed for want of jurisdiction.

Dated this 6th day of January, 1956.

/s/ GEO. H. BOLDT,
United States District Judge.

[Endorsed]: Filed January 9, 1956.

In the District Court of the United States for the Western District of Washington, Northern Division

Civil No. 3992

SEATTLE ASSOCIATION OF CREDIT MEN, a Corporation,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

ORDER

Hearing on the motion of the defendant, United States of America, to dismiss this action, having come on regularly to be heard before the undersigned Judge of the above-entitled Court on Monday, December 19, 1955; the defendant appearing by Charles P. Moriarty, United States Attorney for the Western District of Washington, and Thomas

R. Winter, Special Assistant to the Regional Counsel, San Francisco Region, Internal Revenue Service, its attorneys, and being represented in court by said Thomas R. Winter; and the plaintiff appearing by Croson, Johnson & Wheelon, its attorneys, and being represented in court by Willard Hatch; written Memorandum of Authorities having been filed on behalf of the parties and the Court having rendered a Memorandum Decision dated January 6, 1956, and good cause appearing therefor, it is hereby

Ordered that the action must be dismissed for want of jurisdiction, and the defendant's motion is granted and the action be, and the same is hereby dismissed.

Dated this 17 day of January, 1956.

/s/ GEO. H. BOLDT,
Judge.

Presented by:

/s/ THOMAS R. WINTER.

Copy received, approved as to form, and notice of presentation hereby waived:

/s/ WILLARD HATCH,

[Endorsed]: Filed January 17, 1956.

Entered January 18, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Seattle Association of Credit Men, a corporation, plaintiff in the above entitled action, having herewith filed the necessary bond, does herewith appeal to the United States Court of Appeals for the Ninth Circuit from the Order of dismissal entered in the above entitled action on the 17th day of January, 1956, and filed on the 18th day of January, 1956, by the Honorable George H. Boldt, United States District Judge.

CROSON, JOHNSON &
WHEELON,

/s/ WILLARD HATCH,
Attorneys for Plaintiff.

[Endorsed]: Filed February 2, 1956.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents:

That we, Seattle Association of Credit Men, a corporation, the Plaintiff above named, as Principal, and the United Pacific Insurance Company, a corporation organized under the laws of the State of Washington, and authorized to transact the business of surety in the State of Washington, as Surety, are held and firmly bound unto The United States of America, in the just and full sum of two hundred

fifty and no/100 dollars ($250.00), for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of January, 1956.

The condition of this obligation is such, that,

Whereas, on the 17th day of January, 1956, in the above entitled action and Court, the Defendant's motion for dismissal for want of jurisdiction was granted, and

Whereas, The above-named Principal has heretofore given due and proper notice that it appeals from said Order of said Court,

Now, Therefore, if the said Principal, Seattle Association of Credit Men, a corporation, shall pay all costs and damages that may be awarded against it on the appeal, or on the dismissal thereof, not exceeding the sum of two hundred fifty and no/100 dollars ($250.00), then this obligation to be void; otherwise to remain in full force and effect.

SEATTLE ASSOCIATION OF CREDIT MEN,

By /s/ WILLARD HATCH,
Its Attorney,

[Seal] UNITED PACIFIC INSURANCE COMPANY,

By /s/ R. E. EICKMAN,
Attorney-in-Fact.

Countersigned:

ALEXANDER MYERS & CO.

By /s/ KENNETH G. MYERS,
Resident Agent, Seattle, Wash.

[Endorsed]: Filed February 2, 1956.

[Title of District Court and Cause.]

STATEMENT OF POINTS

The Plaintiff, Seattle Association of Credit Men, herewith states the points on which it intends to rely in this appeal.

That the lower court erred in dismissing the plaintiff's Complaint for want of jurisdiction.

CROSON, JOHNSON & WHEELON,

/s/ WILLARD HATCH,
Attorneys for Plaintiff.

[Endorsed]: Filed February 2, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Wash-

ington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, and designation of counsel, I am transmitting herewith the following original documents in the file dealing with the action, as the record on appeal herein to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers and documents being identified as follows:

1. Complaint, filed Aug. 19, 1955.
4. Motion Deft. to Dismiss, filed Nov. 14, 1955.
10. Memorandum Decision filed Jan. 9, 1956.
11. Order Dismissing action, filed Jan. 17, 1956.
12. Notice of Appeal, filed Feb. 2, 1956.
13. Bond on Appeal, filed Feb. 2, 1956.
14. Statement of Points on Appeal, filed Feb. 2, 1956.
15. Designation of Contents of Record on appeal, filed 2-3-56.
16. Proof of service of Designation and Statement of Points as filed Feb. 9, 1956.

In witness whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 13th day of February, 1956.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for preparation of the record on appeal in this cause, to-wit: Filing fee, Notice of Appeal,

$5.00; and that said amount has been paid to me by counsel for appellant.

Dated: Seattle, Feb. 13, 1956.

MILLARD P. THOMAS,
Clerk,

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 15042. United States Court of Appeals for the Ninth Circuit. Seattle Association of Credit Men, a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed February 21, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15042

SEATTLE ASSOCIATION OF CREDIT MEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S STATEMENT OF POINTS AND DESIGNATION OF RECORD

The appellant having heretofore filed its Statement of Points and Designation of Contents of Record on Appeal being papers identified as Nos. 14 and 15 in the certificate of the Clerk of the United States District Court to the Record on Appeal; now, therefore,

The appellant does herewith adopt by reference, the same as though incorporated herein in full, said Statement of Points and Designation of Contents of Record on Appeal as its Statement of Points and Designation of Record as required by Rule 17 (6) of the Rules of the United States Court of Appeals for the Ninth Circuit.

CROSON, JOHNSON &
WHEELON,
/s/ WILLARD HATCH,
Attorneys for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed February 21, 1956.

No. 15042

United States Court of Appeals

For the Ninth Circuit

SEATTLE ASSOCIATION OF CREDIT MEN, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, *Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

CROSON, JOHNSON & WHEELON,
WILLARD HATCH,
Attorneys for Appellant.

900 United Pacific Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

FILED

MAY 10 1956

No. 15042

United States Court of Appeals

For the Ninth Circuit

SEATTLE ASSOCIATION OF CREDIT MEN, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, *Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

CROSON, JOHNSON & WHEELON,
WILLARD HATCH,
Attorneys for Appellant.

900 United Pacific Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

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RECORD

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United States Court of Appeals
For the Ninth Circuit

SEATTLE ASSOCIATION OF CREDIT MEN, a corporation, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 15042

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

JURISDICTION

Jurisdiction in the District Court was based on all the facts alleged in the Amended Complaint (Tr. 3-28) and upon 28 U.S.C. §2410 and 28 U.S.C. §1346(a)(2). Jurisdiction was also based on 28 U.S.C. §1340 (Tr. 4) and 28 U.S.C. §2463 (Tr. 5, 7, 8, 9).

The District Court, having entered an order granting a dismissal for want of jurisdiction of appellant's Amended Complaint jurisdiction in the Court of Appeals is based on 28 U.S.C. §§1291, 1294.

STATEMENT OF THE CASE

The only question involved in this appeal is whether a federal court has jurisdiction of an action to quiet title to funds in appellant's hands, and to contract funds in the hands of a collecting bank which have

been assigned to appellant, as against levies of the United States against appellant for liens based on taxes due by a corporate taxpayer, not appellant, which taxes accrued after the corporate taxpayer made a duly recorded chattel mortgage in trust for the benefit of unsecured creditors to appellant, and which liens and levies were made after said corporate taxpayer executed a bill of sale to appellant of all its assets and after appellant had reduced all of said assets to cash and all of the contracts in the hands of the collecting bank had been paid in full.

The lower court held that it had no jurisdiction, after a hearing on a motion to dismiss. No facts were in dispute.

SPECIFICATION OF ERRORS

1. The District Court erred in granting appellee's motion to dismiss for want of jurisdiction.

ARGUMENT

Summary

It is appellant's contention that the statutes of the United States grant to the federal courts jurisdiction to try a quiet title action to funds in the hands of a third party, not the taxpayer, which have been levied upon as the taxpayer's property pursuant to liens filed against the taxpayer.

Statutes

Until 1942, the predecessor to 28 U.S.C. §2410 (28 U.S.C. §901) read as follows, insofar as it affects this controversy:

> " . . . the United States may be named a party in any civil action or suit in any district court, * * * or in any state court having jurisdiction of the subject matter, for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien."

In 1942, the statute was amended to read as follows (by Act of December 2, 1942, Ch. 656, 56 Stat. 1026):

> " * * * the United States may be named a party in any civil action or suit in any district court, * * * or in any state court having jurisdiction of the subject matter, *to quiet title to or* for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien." (Italics supplied to denote added portion)

Various minor changes were made in this statute in 1948 and 1949 when the Judiciary Act was recodified, but none of those changes affect the import of this case.

Other statutes bearing on jurisdiction are 28 U.S.C. §§1340, 1346, 2463, to which reference will be made later.

Legislative History

Appellees may try to make much of the legislative history of the Act of December 2, 1942 (Ch. 656, 56 Stat. 1026) (28 U.S.C. §2410) by citing some excerpts from S.R. No. 1646, 77 Cong., 2d Session, which leave the impression that the insertion of the "quiet title" words was intended to apply only to real estate.

If this were so, the Act in 1942 could easily have been drafted to confine the added words to this specific inten-

tion by supplying the words "real estate" after "to quiet title to."

Even if the first purpose of the amendment was t assist real estate titles, there is no reason known to s why it should not be given its fullest meaning as presently drafted, *i.e.,* to clear clouds from real and personal property.

The Lower Court's Decision

In its Memorandum Decision (Tr. 30-31), the lower court ruled that appellant's action must be dismissed for want of jurisdiction. It based its decision on the premise that 28 U.S.C. §2410 was limited solely to situations involving judicial sales.

While conceding that there was one Circuit Cour opinion to the contrary, the lower court based its rul ing on one other Circuit Court decision and four Dis trict Court decisions.

The one Circuit Court decision, *Metropolitan L Insurance Co. v. U. S.* (6th Cir.) 107 F.(2d) 311, on which the lower court here relied is not applicable for two reason; first, it was decided in 1939 prior to the 1942 amendment set forth above, and second, at n place in the decision is §2410's predecessor, 28 U.S.(§901, considered. Moreover, the suit was not one to quiet title, but was in fact, a proceeding to extinguish a lie Nowhere in the present action does appellant ask to have the government's lien extinguished. It merel asks for a declaration that the levy does not apply to the funds in appellant's hands, or which appellant is entitled to draw down from the collecting bank.

In granting that one Circuit Court decision, *Adler v. Nicholas* (10th Cir.) 166 F.(2d) 674, was in favor of appellant, the lower court nevertheless overlooked one other case supporting appellant's position, to-wit: *Jones v. Tower Production Co.* (10th Cir.) 138 F.(2d) 675 decided in 1943. There were, therefore, at the time of the decision herein, two Circuit Court cases upholding appellant's position, both of which were cited to the lower court, and there were no cases denying jurisdiction, at least since 1942. No recent cases have been found, and the Supreme Court of the United States has not passed on the subject.

The lower court, therefore, rested its entire opinion on four District Court cases. Of these, the first, *Integrity Trust Co. v. U. S.,* 3 F.Supp. 577, was decided before 1942. Following the existing statute, §901, the New Jersey District Court held that U. S. liens could be removed only by sale of the affected premises and not by strict foreclosure.

The next case cited, *Borough of Kenilworth v. Corwine,* 96 F.Supp. 68, was also a New Jersey case but involving the exact facts as the previous case. On the authority of the *Integrity Trust Co.* case, *supra,* the district court denied jurisdiction, holding

> " . . . that consent to be sued in a strict foreclosure proceeding had not been given by the United States, since the statute contemplated a judicial sale."

The next case cited is *Miners Sav. Bank of Pittston, Pa. v. U. S.,* 110 F.Supp. 563. In this action the plaintiff bank had foreclosed prior recorded real estate mortgages and the value of the property at the time of sale

was less than the amount of the mortgage. The bank then entered into a contract to sell the property but found that the United States had filed tax liens against the property after the taking of the mortgage but before foreclosure. The bank sued to quiet its title as against the United States lien for taxes. The government had not been named as a party to the foreclosure proceedings.

The government insisted that the bank was obliged to follow sale proceedings prescribed in 26 U.S.C. §3679. The court held that the bank had another remedy provided by the amended §901, now 28 U.S.C. §2410(a), saying:

> "Under similar circumstances, prior to the 1942 amendment to the Act of 1931, the Courts were in conflict as to the relief which might be afforded."

In a footnote, the Pennsylvania district court referred to the two conflicting views. In one, the court under old §901 had to order a sale. This line of authorities was represented by the *Metropolitan Life Ins. Co.* case, *supra.* In the other view, when it was obvious that the value of the property was insufficient to satisfy even a prior lien, the court could order cancellation of the tax lien without sale (See authorities cited in Footnote 24). The district court went on to say:

> "Confronted by the diversity of opinion, Congress passed the 1942 amendment to include actions to quiet title in addition to those for foreclosure of mortgages and other liens. This in effect extended the scope of relief which could be granted in actions brought under the Act."

The court went on to enter a decree cancelling the government's lien.

We would therefore argue that the foregoing case supports our position rather than the government's, inasmuch as no judicial sale was found necessary.

The last case cited by the lower court is *Bank of America Nat. Trust & Sav. Assn. v. U. S.,* 84 F.Supp. 387. In this action, the court ordered a resale of the property foreclosed by the plaintiff but fixed the priority of the liens. Plaintiff had neglected to join the United States, the holder of inferior tax liens, in its foreclosure. The facts are not applicable to the present case, nor was there any discussion of or reference to §2410.

If the words "judicial sale" in 28 U.S.C. §2410 (c) were held to control, as the lower court seems to decide, then the quiet title provisions of §2410(a) could have no meaning. It goes without the necessity of citation that there is no judicial sale in a quiet title action.

In our opinion, the meaning of §2410(c) is confined to those cases where a judicial sale is a part of the procedure used. The legislative wording is required because of the lack of existence of any federal procedure in foreclosure actions. It should not be broadened to restrict the effect of the quiet title amendment.

Authorities Supporting Jurisdiction

The federal courts have long sought ways and means to prevent the United States from collecting the taxes of a third party from a non-delinquent taxpayer. Despite prohibitions against the issuance of injunctions to restrain the collector from collecting taxes, some courts have by-passed the statutes and held them inapplicable. The effect of these decisions has been to per-

mit suits by third parties to enjoin the collector from levying on property belonging to the third party to satisfy the tax liability of another. See *Jones v. Kemp* (10th Cir.) 144 F.(2d) 478; *Tomlinson v. Smith* (7th Cir.) 128 F.(2d) 808, and *Rothensies v. Ullman* (3rd Cir.) 110 F.(2d) 590.

Most courts which have passed on the subject felt that the 1942 amendment to 28 U.S.C. §901, now §2410, removed the problems presented heretofore. The first case to invoke the new wording was *Jones v. Tower Production Co.* (10th Cir.) 138 F.(2d) 675.

In that action, plaintiff sued the collector to enjoin the enforcement of a lien and levy. It appears that plaintiff owned an undivided interest in three oil and gas leases upon which the collector levied for taxes due by one Wofford who had no interest in the leases except that he had once held an interest in the company which previously owned the leases. The Circuit Court held that the plaintiff had sued the wrong party defendant but permitted the plaintiff to amend to add the United States saying:

> "The real purpose of the action was to secure an adjudication that the beneficial title to an undivided one-half interest in the leases never vested in Wofford and that the tax lien of the United States never attached thereto. It was not the simple case where a Collector seeks to collect by distraint the taxes of one person out of the property of another. There was a real controversy, presenting substantial issues of law and fact, respecting the title to an interest in the leases and funds and the claim that the lien of the United States attached thereto. It was necessary to determine that controversy be-

fore the relief sought could be granted. It was, in substance, an action to determine title and the rights of the United States under a tax lien asserted by it against such interest and the funds. Upon the issues thus presented, the United States was entitled to be heard."

The next case in the Circuit Courts was *Adler v. Nicholas* (10th Cir.) 166 F.(2d) 674. This case is very much in point in the present controversy. In this action, the taxpayers had been engaged in the jewelry business but had been forced to sell out because of growing debts. The sale proceeds, along with additional funds of one Evans, were deposited with a bank to pay off partnership debts. The collector levied on the bank for unpaid partnership taxes and for unpaid individual taxes of the individual partners. The taxpayers and Evans sought to enjoin the collection. Since the partnership property was not subject to individual liabilities until the partnership debts were paid, the Court held that the action could be maintained although the United States was a necessary party. In this particular case, the Court held an injunction would lie, saying:

"Whether the debt due Mrs. Evans, as subrogee of the general creditors, is a liability of the partnership that takes precedence over the lien of the Government for these income taxes is a question to be resolved on the merits by the trial court. We merely hold that as to the interest of Adler and his wife in the net proceeds of the partnership, if any, and the interest of Mrs. Evans in the assets of the partnership, as subrogee, they had such an interest in the property as would permit them to maintain an action to enjoin the Government from selling the same in violation of their rights there-

in. As to such property, they were not taxpayers and were, therefore, not subject to the applicable statutory provisions which require the taxpayer to pay such tax under protest and then to sue to recover. They stand in the relationship of third parties claiming an interest in property which the Government asserts a right to sell to satisfy an income tax liability of another, and could, therefore, maintain this action to establish their rights, if any, therein.

"So here also the Collector has proceeded by a warrant of distraint against the property and funds that are claimed by third parties. The substance of the action is to determine the title and interest in these funds and the right of the United States under a tax lien asserted against the same. Upon these issues, the United States was a necessary party, and under the statute cited in the Tower Production Company case, the United States has consented to be sued."

Another case in point is *National Iron Bank v. Manning* (N.J.) 76 F.Supp. 841. Here, Mary Walsh, a life beneficiary of Mr. Walsh's trust, assigned part of her income to plaintiff. The assignment was recognized by the trustee. Thereafter, the United States made a levy on the trustee for Mary's taxes. Plaintiff sued to enjoin collection on the ground that the money in the trustee's hands did not belong to Mary. The District Court denied the Government's motion to dismiss holding that since 1942, it had jurisdiction of such controversies under the provision of §2410.

Some cases have held that §2410 alone is not sufficient to confer jurisdiction. Such cases include *Haldeman*

U. S. (Mich.) 93 F.Supp. 889; *Viviano v. U. S.* (Mich.) 105 F.Supp. 312, and *Wells v. Long* (9th Cir.) 162 F. (2d) 842. The first two cases amounted to suits to enjoin the collection of taxes by a taxpayer and are not applicable. The last case involved real estate owned outright by the United States to which the plaintiff sought to quiet title. It also is not pertinent.

One case holds that §2410 alone is sufficient. This is *Petition of Sills* (N.Y.) 115 F.Supp. 293, wherein petitioner sought leave to file suit against the United States to remove a cloud on title to real estate liened by the United States for taxes of another after petitioner acquired title. In denying the petition as unnecessary, the Court said:

> " . . . the petitioner, a non-delinquent taxpayer, not a party to the tax claim, . . . has adequate remedy under Title 28 United States Code, §2410 to test the validity of the tax lien filed against his real property in any State Court having jurisdiction or in any district court provided that the parties in the latter court meet the jurisdictional requirements of the Federal Court. §2410 provided the necessary waiver of immunity of the United States as a party, thus obviating application for leave to sue the United States or to file a civil action against it (Citing cases). An examination of the *Stuart* case and the other cases cited clearly show that such innocent third persons, and the petitioner is in that category, may test the validity of a tax lien in the manner heretofore stated. The *Haldeman* case is distinguishable from the case at bar in that the petitioners were delinquent taxpayers and thus relegated to the Internal Revenue Act for relief rather than to said §2410."

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The Stuart case referred to above is *Stuart v. Chinese Chamber of Commerce* (9th Cir.) 168 F.(2d) 709. In that action, the Director had seized money in the hands of the delinquent taxpayer for liens filed. The money belonged to plaintiff who sued to recover it. In answering the challenge to the jurisdiction, the Court said:

> "The appellees could not have maintained a suit for refund as could a taxpayer from whom a tax had been illegally collected; their only recourse was to bring suit to recover possession of the property in which they claimed to be owners. An action of this nature necessarily brings into issue title to the property seized and in this respect it is similar to a suit to quash a warrant for distraint. The effect of the court's order is merely to resolve all claims to the property under distraint.
>
> "From early days the Supreme Court has held that district courts having jurisdiction of property taken or detained by revenue officers under authority of any revenue law of the United States are given power to decide claims of title and to award to the rightful owner possession of the property seized."

There should be no argument that the funds in the present case are as effectively detained as if the Director had them in his possession. Plaintiff cannot disburse those funds until the levy is lifted. Thus if more than §2410 is needed for jurisdiction, it is provided by 28 U.S.C. §2463. A case in point is *Gerth v. U. S.* (Calif.) 132 F. Supp. 894.

Other cases have held that if more than §2410 is needed to supply jurisdiction, then the provisions of 28 U.S.C. §1340 will do, at least where taxes of any kind

are involved. To this effect see *Colorado Milling & Elevator Co. v. Glenn* (Ky.) 118 F.Supp. 943, where plaintiff was allowed to sue the Director to recover property levied upon by the United States for a tax claim against plaintiff's consignee.

CONCLUSION

The facts in the instant case are clear. Appellee has levied upon property in appellant's hands for taxes due and owing by a third party. Appellant came into possession, or became entitled to receive (in the case of the contract collections), all of these funds before either lien or levy. The only connection that the delinquent taxpayer had to the funds was that it once owned the property which created the funds. The delinquent taxpayer had parted with all ownership in that property long before the government liened or levied.

Thus the case boils down to only two possible triable issues; one, did the taxpayer have sufficient interest in the funds or property claimed by appellant at the time of lien and levy to justify the government's claim; or two, was there any priority in the government's claim over the appellant's chattel mortgage or bill of sale? Both these issues can properly be tried in a quiet title action.

If the trial court finds that the United States has no interest in the funds by virtue of its lien and levy, then the trial court can issue an order, either quashing the distraint, enjoining the levy or decreeing that appellant is the owner of the funds free of any claim from the United States.

If the trial court finds that the United States has some interest in the funds, it can fix priorities, determine amounts, and order disposition of the funds in appellant's hands.

If there were no such procedure as contended for by appellant, then it and others similarly situated would be required forever to await the action of the United States to collect upon its demand, after refusal by the non-taxpayer. The Government has tried to put appellant in that position in this case, making no effort whatsoever on its behalf to decide the question involved, but contenting itself with resisting each and every bona fide attempt on appellant's behalf to clear up the situation.

Other courts have not been satisfied with such an attitude on the part of the government. Even before 1942, they sought and found ways to issue injunctions in similar cases. Since 1942, they have felt more at ease in relieving these burdens, by invoking the quiet title provisions of 28 U.S.C. §2410. Even though the action be framed as a suit to enjoin, a suit to quash a warrant, an action to cancel a lien, or an action to remove a cloud on title, the courts have felt that the quiet title amendment gave them room to act.

The one or two exceptions where §2410 has not afforded relief have been cases where the taxpayer himself was testing the validity of the tax and lien, or where the United States held absolute title to the property involved, or where defects occurred in foreclosure actions requiring judicial sales. None of these exceptions are here involved. The action is not brought by the tax-

payer, the United States had no title and no judicial sale is contemplated.

Appellant cannot pay the tax and sue for a refund as there is no provision in the law for such procedure. Appellant owes a duty to the creditors it represents. It has diligently pursued that duty. It should not be thwarted by the refusal of jurisdiction to determine the right to the funds in controversy. It should be permitted to dispose of the funds in question to the persons entitled thereto and not be required to wait for the government to release the funds in its own manner and time.

To continue to try and defeat appellant's right to an adjudication by every technical means at its disposal, can only mean that the government has little faith in the merits of its position and therefore hopes to win the struggle by delays and procrastination.

Any argument that the granting of jurisdiction in this case would set a bad precedent is spurious. Any third person, whose property is seized for the payment of another's taxes, should be accorded the speediest action to determine his rights. Unless the government makes a practice of seizing the wrong property, there certainly can be made no argument that such suits will greatly increase the litigation burden of the United States. And, if there is such a practice, the United States' litigation burden should be increased. Certainly ordinary taxpayers cannot take advantage of a reversal of this case in favor of appellant because appellant is not the taxpayer involved.

Wherefore, appellant respectfully prays that the

order of dismissal be reversed and that the matter be remanded for trial.

Respectfully submitted.

CROSON, JOHNSON & WHEELON,
WILLARD HATCH,
Attorneys for Appellant.

900 United Pacific Building,
Seattle 4, Washington.

No. 15,042

IN THE

United States Court of Appeals For the Ninth Circuit

SEATTLE ASSOCIATION OF CREDIT MEN, a Corporation, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the Order of the United States District Court District Court for the Western District of Washington, Northern Division

BRIEF FOR THE APPELLEE

CHARLES K. RICE,
Assistant Attorney General.

LEE A. JACKSON,
A. F. PRESCOTT,
S. DEE HANSON,
Attorneys,
Department of Justice,
Washington 25, D. C.

CHARLES P. MORIARTY,
United States Attorney.

EDWARD J. McCORMICK, JR.,
Assistant United States Attorney.

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IN THE

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No. 15,042

SEATTLE ASSOCIATION OF CREDIT MEN, a Corporation, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the Order of the United States District Court for the Western District of Washington

---

BRIEF FOR THE APPELLEE

OPINION BELOW

The District Court's opinion, entitled "Memorandum Decision" (R. 30-31), is not officially reported.

JURISDICTION

This appeal was taken by the Seattle Association for Credit Men, a corporation, from the order of the District Court entered on January 18, 1956 (R. 31-32),

in an action brought by it against the United States on August 19, 1955, in the court below. The jurisdiction of the court below was claimed by plaintiff-appellant to have been invoked under 28 U.S.C., Section 2410. The order of the District Court was entered on January 18, 1956. (R. 31-32). Within 60 days, and on February 2, 1956, notice of appeal was filed by the appellant. (R. 33.) Bond was filed by the appellant on February 2, 1956. (R. 33-35). The jurisdiction in respect of the appeal is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

The appellant is the assignee of all of the insolvent corporate taxpayer's property for the benefit of unsecured creditors. The assignment was executed on June 2, 1953. On June 15, 1953, following the sale of the taxpayer's assets by the appellant, the Director of Internal Revenue made a levy and demand upon the latter for withholding and employment taxes due and owing by the taxpayer for the calendar quarter ended March 31, 1953.

The question presented is whether the District Court erred in holding that it did not have jurisdiction of this suit praying that the Director's levies be removed from the property so assigned, in which the appellant disclaims any interest.

STATUTE INVOLVED

The pertinent provisions of the applicable statutes involved are printed in Appendix, A, *infra*.

STATEMENT

The pertinent facts gathered from the various pleadings, motions, etc., of the parties involved, as submitted to the court below in this case (R. 4-30), are substantially as follows:[1]

The taxpayer, Western Appliance Company, Inc., on July 1, 1952, while solvent but unable to pay all its bills in the ordinary course of business, made and executed, at the request of its unsecured creditors, to the appellant a chattel mortgage in trust, assigning to the latter "all its property of every kind and description" (R. 10-23), for the purpose of securing an extension of time within which to pay its existing unsecured liabilities (R. 4). The mortgage trust provided, among other things, that the assignment was (R. 12, 15-16)—

> * * * in trust, nevertheless, for the use and benefit of the present unsecured creditors of said mortgagor [taxpayer] * * *.
>
> * * *
>
> * * * said [taxpayer] mortgagor further agrees to pay all taxes and claims * * * which could become a lien against said property and take precedence over this mortgage; and in the event that said mortgagor fails, neglects, or refuses to pay any of the items set forth above in this paragraph as and when they become due, the mortgagee at

[1] While the appellant states that "No facts were in dispute" in the court below (Br. 2), yet it will be noted that some of the allegations as set forth in its complaint are conclusions or in the nature of conclusions (See R. 8-9, for example); hence, we have stated them as allegations, etc., in so far as necessary and appropriate.

> its option may pay the same and the amount thereof shall be added to the amount due otherwise under this mortgage with like interest thereon.

This mortgage was recorded with the Auditor of King County, Washington, on July 3, 1952. The chattel mortgage was given as security for the payment of a promissory note for $22,000 which was dated July 1, 1952. At the same time, the appellant took from the taxpayer an assignment of all its existing and future-accruing accounts, notes and conditional sale contracts receivable.[2] (R. 4, 21-22, 27-28.) The tax payer-mortgagor's "Assignment of Accounts and Notes Receivable" to the appellant on July 1, 1952, also provided, among other things, as follows (R. 22, Ex. B):

> This assignment, however, is in trust for the benefit of the creditors of said [taxpayer] WESTERN APPLIANCE, CO., INC., and is in conjunction with and ancillary to that certain mortgage in trust executed and delivered to the SEATTLE ASSOCIATION OF CREDIT MEN the [1st] day of [July], 1952, and the terms set forth in said trust mortgage are to govern as to distribution of the funds derived hereby.

On June 2, 1953, the taxpayer was insolvent and unable to make payments under the note and trust mortgage, and therefore executed in favor of the appellant a bill of sale of all of the assets covered by the

---

[2] This assignment, however, was (R. 28) "subject of course to [the taxpayer's] prior assignments [of receivables] to * * * [the Seattle National Bank of Commerce, University Branch] on account of [conditional sale] contracts pledged for loans" (R. 6, 7, 28), as shown hereinafter.

mortgage in lieu of the foreclosure thereof. (R. 23-27.) This bill of sale was recorded on June 5, 1953, with the Auditor of King County. (R. 5.)

On June 15, 1953, following the appellant's sale of all the the taxpayer's assets, the District Director of Internal Revenue (hereinafter called the Director) made a levy upon the appellant for income withholding and social security (employment) taxes and interest thereon due and owing by the taxpayer in the total sum of $1,632.29 for the calendar quarter ended March 31, 1953, for which a lien had been filed by the United States Government on June 15, 1953, in the amount of $1,339.55, plus penalties and interest. Demand was therewith made upon the appellant for the amount necessary to satisfy those taxes, etc., all of which had accrued after July 1, 1952, the date of the above-mentioned trust mortgage. (R. 5-6.) The appellant answered this levy on July 16, 1953, stating that it had funds in its possession in the sum of $4,176.37, admitting liability with respect to certain of the taxpayer's F.U.T.A. taxes as abated to and due and owing to the United States in the amount of $21.04 (R. 5), and setting forth the existence of the above-mentioned trust mortgage (R. 6).

Before and at the time of the execution of the above trust mortgage on July 1, 1952, the taxpayer had been in the business of selling appliances on conditional sale contracts, and these contracts, previously pledged by the taxpayer for loans, were on the latter date, with full right of recourse, assigned to the Seattle National Bank of Commerce, University Branch (hereinafter called the bank), for collection. The bank, as a part

of this assignment, accumulated a portion of the proceeds of each contract into a fund called a "reserve fund" to secure the bank's contingent liabilities on the conditional sale contracts. No accounts (conditional sale contracts) were assigned by the taxpayer to the bank after the date of the trust mortgage. (R. 6, 27-28).

The appellant notified the bank of the existence of the trust mortgage on or about July 2, 1952, and of the assignment of the accounts receivable. By letter dated March 27, 1953, the appellant advised the bank that the taxpayer, by signed endorsement set forth on the letter, had authorized the bank to pay the entire accumulated "reserve account" directly to the appellant (R. 28) "when the [taxpayer's conditional sale] contracts now in your possession [shall] have paid out * * * ." (R. 27-28). Thereafter, the bank forwarded monthly reports to the appellant on all contracts which had been theretofore assigned by the taxpayer to the bank as pledges for loans, and where defaults occurred on the contracts, the bank required the appellant to repurchase the contracts pursuant to the terms thereof, after which the appellant made its own collections on the contracts. (R. 6-7.)

On June 18, 1953, the Director levied on the University Branch of the bank in the total sum of $1,574.84 for the same taxes secured by the same lien filed on June 15, 1953, above referred to. On July 6, 1953, the bank answered the levy, denying that it held any money or property belonging to the taxpayer, and set forth the interest of the appellant therein. (R. 7.)

All of the contracts covered by the "reserve fund" have now been paid in full, and the bank no longer

claims any interest therein, and is ready to pay the proceeds to whomsoever may be entitled to them, but it has refused to pay the proceeds to the appellant because of the Government's levy. These proceeds now amount to $2,472.68 ($472.68 in cash, and two United States Treasury bonds in the face amount of $1,000 each). (R. 7.)

In connection with the trust mortgage of July 1, 1952, the appellant has received numerous claims in behalf of the unsecured creditors of the taxpayer existing as of July 1, 1952. The total amount of these claims is $21,404.85. To date, the creditors have received on their claims the sum of $2,140.50, and the appellant has on hand, not including the funds now in possession of the bank, the sum of $2,528.06 with which to pay a final dividend to the creditors. More than a year has expired since the Government's levies above-mentioned, and the appellant, allegedly because of the levies, has been prohibited from making any further distribution to the creditors. (R. 8.)[3]

The appellant alleged in the court below that the moneys in its hands and those in the possession of the bank but belonging to the appellant purportedly are not moneys of the taxpayer, and that the appellant, because of the Director's levies, allegedly has been prohibited for more than a year from disposing of such moneys and will continue to be so prohibited unless the levies are released or disposed of. (R. 8-9.) The appellant, through its attorneys, has on numerous occasions requested the Director and his advisory counsel to release the levies but on each and every

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[3] See **fn. 1**, *supra*.

occasion the latter have refused to do so, despite the fact that the taxpayer allegedly has no interest whatsoever in any of the funds above referred to. (R. 8.)[4]

The levies in question purportedly constitute a cloud upon the title of the appellant to the funds in its and the bank's hands. The Government has made no effort to seize the property in the hands of the appellant and the bank, nor has it made any attempt to collect the taxes underlying the levies in question; rather the Government, allegedly, has consistently refused to permit the appellant to adjudicate the question of its right to such funds. (R. 9.)[5]

Upon a consideration of the foregoing facts and/or allegations, the District Court, pursuant to the Government's motion (R. 29-30), entered its order of dismissal of the appellant's suit for lack of jurisdiction on January 18, 1956 (R. 31-32). From the order so entered, the appellant appealed to this Court for review. (R. 33.)

SUMMARY OF ARGUMENT

1. The appellant's contention that the District Court had jurisdiction in this case under 28 U.S.C., Section 2410, is without merit. That section is merely a consent of the United States to be sued in a proper action—one to quiet title to or for the foreclosure of a mortgage or other lien upon property on which the United States has or claims a mortgage or other lien. The section does not confer jurisdiction over the United States upon the Federal District Courts, but is merely

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[4] See fn. 1, *supra*.

[5] See fn. 1, *supra*.

a consent to be sued in a suit in which the district court already has jurisdiction otherwise independently of that section. Further, the appellant cites no case, and we find none, which holds that the section is operative in a suit where the plaintiff disclaims any right in the property involved, as here.

Moreover, the purpose of the instant suit is no different from that of the former suit (134 F. Supp. 439) which was brought by the appellant in connection with the same property, and in which the District Court held that it had no juridiction on the ground that the suit for injunctive relief there was prohibited by Section 7421 of the Internal Revenue Code of 1954. Section 7421 prohibits suits instituted for the purpose of restraining the assessment or collection of any federal tax. In this connection, it should be noted that there is no showing here by the appellant that its remedies at law are inadequate. Because of the appellant's refusal to pay upon levy and demand, the United States will probably be required to bring suit against it, asserting the penalty under Section 3710 of the Internal Revenue Code of 1939 (now Section 6332 of the 1954 Code) for failure to pay, in which suit the appellant could then, as adequate remedy at law, assert as a defense the question at issue which it now seeks to have decided here. Nor is it clear that the appellant could not pay the tax and sue to recover upon the grounds alleged here.

Neither has the appellant demonstrated that it was not possible for the Government to have acquired a lien prior to the corporate taxpayer's assignment of all its property to appellant. Further, the voluntary

assignment to appellant by the insolvent taxpayer of all its assets for the benefit of its unsecured creditors thereupon brought Section 3466 of the Revised Statutes into play, showing that the Government, under controlling authority cited hereinafter, is thereby entitled to priority in payment of the taxes due and owing the United States by the taxpayer.

All of the cases cited by the appellant here—except one in which the facts are different and which in any event we submit is erroneous (dealt with hereinafter) —involved the question of whether property upon which a collector had distrained was property of the taxpayer, or was property of another. None involves the question presented in the instant case, namely, whether the United States is entitled to be first paid from property of the insolvent corporate taxpayer, all of which it has voluntarily assigned to another for the benefit of unsecured creditors. In other words, the appellant's obvious purpose in bringing this suit is merely to try out and determine the priorities in respect of the property of the taxpayer. There is a marked difference, however, between a suit to determine the ownership of property, upon which a levy has been made and one where, as here, the appellant is requesting this Court to decide the relative priorities of a claim for federal taxes and the adverse claims of individuals.

2. In addition, from the jurisdiction of the federal courts to render declaratory judgments under the statute hereinafter cited, judgments with respect to federal taxes are specifically excepted. Nor did the District Court have jurisdiction under the several other

provisions of the statute, cited and relied on by the appellant and dealt with *infra*. If the court below had jurisdiction under those sections, then it would have had jurisdiction to enjoin the collection of internal revenue taxes, which is strictly prohibited by the Internal Revenue Code, as well as jurisdiction to declare judgments in respect of federal taxes which, as pointed out, is distinctly excepted from the statute providing for declaratory judgments.

ARGUMENT

THE DISTRICT COURT DID NOT ERR IN GRANTING THE GOVERNMENT'S MOTION TO DISMISS FOR WANT OF JURISDICTION

The sole question presented is whether the District Court erred in granting the Government's motion to dismiss and holding that it did not have jurisdiction of this suit, brought under 28 U.S.C., Section 2410 (Appendix A, *infra*), and praying that the Director's levies be removed from the insolvent taxpayer's property which it assigned to the appellant for the benefit of its unsecured creditors and in which the appellant disclaims any interest. The appellant contends that the District Court erred in so holding (Br. 2), arguing that the statutes of the United States, particularly Section 2410, grant to the federal courts jurisdiction to try quiet-title actions to funds in the hands of a third party, other than the taxpayer, which have been levied upon as the taxpayer's property pursuant to liens filed against the taxpayer (Br. 2-13). We submit that these contentions are without merit.

A. The District Court Was Without Jurisdiction Under 28 U.S.C., Section 2410

The statute relied on by the appellant (Br. 2-3) in the instant action (28 U.S.C., Section 2410(a),[6] provides in pertinent part as follows:

> Sec. 2410. *Actions affecting property on which the United States has lien*
>
> (a) Under the conditions prescribed in this section * * * the United States may be named a

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[6] Since the appellant, in its quotations (Br. 3), has confused and intermingled the provisions of this statute with those of the original 28 U.S.C., Section 901, we quote the predecessors to 28 U.S.C., Section 2410, which provided as follows:

Act of March 4, 1931, c. 515, 46 Stat. 1528, provided in pertinent part that—

> * * * upon the conditions herein prescribed for the protection of the United States, the consent of the United States be, and is hereby given, to be named a party in any suit which is now pending or which may hereafter be brought in any United States district court * * * for the foreclosure of a mortgage or other lien upon real estate, for the purpose of securing an adjudication touching any mortgage or other lien the United States may have or claim on the premises involved.

The Act of March 4, 1931, c. 515, 46 Stat. 1528, as amended by the Act of December 2, 1942, c. 656, 56 Stat. 1026 (original 28 U.S.C., Section 901) provided in pertinent part that—

> Section 1. Upon the conditions herein prescribed for the protection of the United States, the consent of the United States is given to be named a party in any suit which is now pending or which may hereafter be brought in any United States district court, * * * and in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real estate or personal property, for the purpose of securing an adjudication touching any mortgage or other lien the United States may have or claim on the premises or personal property involved.

> party in any civil action or suit in any district court, * * * or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien.
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> * * * * *

In the first place, it is an established rule of jurisprudence that the United States may not be sued without its consent. *United States* v. *Clarke,* 8 Pet. 436, 443-444; *Lynch* v. *United States,* 292 U.S. 571, 581; *Dismuke* v. *United States,* 297 U.S. 167, 171-172. Suits for the recovery of taxes may be maintained against the Government only under such conditions and subject to such limitations as Congress may prescribe. *Collector* v. *Hubbard,* 12 Wall. 1; *Cheatham* v. *United States,* 92 U.S. 85; *Rock Island, &c., R.R.* v. *United States,* 254 U.S. 141; *United States* v. *Michel,* 282 U.S. 656; *United States* v. *Jefferson Electric Co.,* 291 U.S. 386; *Anniston Mfg. Co.* v. *Davis,* 301 U.S. 337. It is settled that "An action may not be maintained against the United States in any case not clearly within the terms of the statute by which it consents to be sued." *United States* v. *Michel, supra,* p. 659; *Rock Island, &c., R.R.* v. *United States, supra,* p. 143.

Next, as to the relief sought by the appellant here under 28 U.S.C., Section 2410 (R. 9; Br. 2-3), we submit that, contrary to its contentions (Br. 2, 7, 13-16), the court below correctly held that it was without jurisdiction (R. 30-31), just as it had held on the same facts in the prior suit brought by the appellant to try out the priorities in respect of the property of

the same insolvent taxpayer (134 F. Supp. 439; see also Affidavit of Thomas R. Winter, Appendix B, infra).[7] The court, in concluding that the instant action must be dismissed for want of jurisdiction, held that a reading of Section 2410 in its entirety discloses that the consent to suit by the United States referred to therein is limited to situations involving judicial sales. (R. 30-31.) It cited in support thereof *Metropolitan Life Ins. Co.* v. *United States,* 107 F. 2d 311 (C.A. 6th), certiorari denied, 310 U.S. 630; *Miners Sav. Bank of Pittston, Pa.* v. *United States,* 110 F. Supp. 563 (M.D. Pa.); *Borough of Kenilworth* v. *Corwine,* 96 F. Supp. 68 (N.J.); *Bank of America National T. & S. Ass'n* v. *United States,* 84 F. Supp. 387 (S.D. Cal); and *Integrity Trust Co.* v. *United States,* 3 F. Supp. 577 (N.J.); (see also *Ford Bros. & Co.* v. *Eddington Distilling Co.,* 30 F. Supp. 213 (M.D. Pa.)). An examination of these decisions discloses that, contrary to the taxpayer's attempted distinctions here (Br. 4-7), the court below properly held that they are more consistent with the language

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[7] This affidavit (together with the District Court's opinion handed down April 29, 1955, in the appellant's first action, No. 1840, reported in 134 F. Supp. 439) constitutes an integral part of the Government's motion to dismiss which is contained in the record on appeal, as transmitted by the Clerk of the District Court to the Clerk of this Court (R. 36), and was designated by the appellant in its designation of contents of record (Item No. 2) for inclusion in the printed record upon appeal. Hence, it is a proper part of the record upon appeal. Since the appellant apparently inadvertently failed to include the affidavit in the printed record, however, we have printed it in Appendix B, *infra,* for the convenience of the Court. The District Court's opinion above referred to, now being officially reported, has been omitted from Appendix B.

of the statute and its legislative history than is the single decision (*Adler* v. *Nicholas*, 166 F. 2d 674 (C.A. 10th)), holding otherwise (R. 30-31)—which we submit is clearly distinguishable, as shown hereinafter.

Whether or not the appellant agrees with the reasons assigned by the District Court for its decision here (R. 30-31), it is clear that the conclusion reached —that it was without jurisdiction under Section 2410 —is correct, nor has the appellant shown it to be in anywise wrong. Section 2410 is merely a consent on the part of the United States to be sued in a proper action, that is, as shown, in an action to quiet title to or for the foreclosure of a mortgage or other lien upon property on which the United States has or claims a mortgage or other lien. Since the relief afforded by that section is incidental and not primary, it is clear that consent to be sued thereunder may not properly be invoked as giving jurisdiction to the District Court over the United States in a situation where, as here, jurisdiction is not already otherwise granted independently of that section. This Court and others have so held. *Wells* v. *Long*, 162 F. 2d 842, 843 (C.A. 9th); *Bristow* v. *Hanset Lumber Co.* (Ore.), decided June 17, 1953 (1953 P-H, par. 72, 650); *Haldeman* v. *United States*, 93 F. Supp. 889 (Mich.). Nor, as this Court said in the *Wells-Long* case (p. 843), can federal jurisdiction under Section 2410 be predicated merely on the fact that the United States is named a party to the suit, as here. Further, the appellant cites no case, and we find none, which holds that Section 2410 is operative in a suit where the plaintiff disclaims any right in the property involved, as here.

In the *Wells-Long* case, appellant Wells brought an action, under former Section 901 of Title 28 U.S.C., as amended by the Act of December 2, 1942, c. 656, 56 Stat. 1026, *supra*—the predecessor of 28 U.S.C., Section 2410, *supra*, here involved—against the United States and another (one Mrs. Long) to quiet title to certain lands conveyed by the latter to the United States, and the appellees urged that the United States had not by that statute waived its immunity from suit to quiet title to the land which it claimed to own in fee. The appellees cited the legislative history—as relied on by the District Court here (R. 30-31, Br. 3)—of the 1942 amendment to Section 901, on which appellant Wells there relied, and called (p. 844) this Court's attention to—

> the restrictive verbiage of the Act, particularly the provision limiting the waiver of immunity to suits "for the purpose of securing an adjudication touching any mortgage or other lien the United States may have or claim on the premises or personal property involved." [This Court stated that] *The interpretation* [*thus*] *urged seems on the face of things to be well grounded*, but we refrain from deciding the point since we are of [the] opinion that the court below was without jurisdiction to entertain the suit. [Italics supplied.]

Likewise here, the same legislative history of the 1942 amendment to Section 901 (S. Rep. No. 1646, 77th Cong., 2d Sess., pp. 1-3),[8] as referred to by this Court

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[8] Clearly showing that the appellant's case does not come within the provisions of the 1942 amendment, 28 U.S.C., Section 901, or

in the *Wells-Long* case (p. 844), and cited by the appellant here in respect of the successor (Section 2410) to the 1942 amendment (Br. 3-4), together with the restrictive terminology of Section 2410(a), particularly the provision limiting the waiver of immunity to suits "to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien," fully supports our position and the District Court's decision that the United States has not, by Section 2410(a), waived its immunity to the appellant's suit ostensibly to quiet title to the funds here in question, but in substance and fact to try out and determine the priorities in respect of the insolvent taxpayer's property. Nor has the appellant shown—though required to do so under the rule

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its successor, 28 U.S.C., Section 1240(a), here involved, are the following pertinent excerpts from S. Rep. No. 1646, p. 1:

* * *

> The purpose of the bill is to permit the United States to be made a party defendant in cases involving foreclosure of mortgages or liens on personal property and to provide a method to clear real-estate titles of questionable or value-less Government liens.
>
> In recent years there have been thousands of mortgages and similar liens on crops, livestock, farm equipment, and other personal property give as security for loans. Under existing law the United States has consented to be a party to suits for the foreclosure of mortgages or other liens on real estate, in order to obtain adjudications concerning any mortgages or liens that the United States may have, or claim, on such real estate. It appears reasonable and proper that the holder of a mortgage or lien on personal property should have the same right to an adjudication concerning a mortgage or lien on personal property as is accorded to the holder of a mortgage or lien on real estate.

enunciated by this Court in the *Wells-Long* case (p. 844)—that the District Court in which the instant action, as well as the preceding one, was "brought has jurisdiction thereof on grounds independent of the statute [Section 2410(a)]". Accordingly, as this Court held in the *Wells-Long* case (p. 844), in the absence of the United States' invoking the jurisdiction of the District Court, and it has not done so here, federal jurisdiction can not be established merely on the fact that the appellant named it as party defendant in the court below. (R. 3.)

Moreover, it is clear that the appellant's real purpose in the instant action (No. 3992)—essentially to try out and determine the priorities in respect of the property of the insolvent taxpayer—is substantially and in effect no different from that of its former suit (Civil No. 1840). The latter was brought by the appellant in connection with the same property which had been assigned to it by the same taxpayer, and in which the court below held that it had no jurisdiction on the ground that the suit for injunctive relief there was prohibited by Section 7421 of the Internal Revenue Code of 1954 (Appendix, *infra*). See *Seattle Association of Credit Men* v. *Frank*, 134 F. Supp. 439, 440 (W.D. Wash.), decided April 29, 1955.[9]

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[9] Within ten days after the District Court's order of dismissal of the first action entered on April 29, 1955, without granting the appellant leave to plead over, the appellant filed an amended complaint (Civil No. 1840) naming, in addition to the Director, the United States also as a party, and praying, in addition to the injunctive relief sought in the first complaint, alternative relief under 28 U.S.C., Section 2410, as here. Since the amended complaint was obviously no less vulnerable for lack of jurisdiction than the original complaint, the Government filed a motion to

Section 7421 prohibits suits instituted for the purpose of restraining the assessment or collection of any federal tax. In this connection, it should be noted that there is no showing by the appellant that its remedies at law are inadequate. And because of the appellant's refusal to pay upon levy and demand, the United States probably will be required to bring suit against it and the bank, asserting the penalty provided by Section 3710 of the Internal Revenue Code of 1939 (Appendix A, *infra*), for their failure or refusal to have paid upon notice and demand. In such suit the defendants could then assert as a defense the question at issue which the appellant seeks to have decided here. This would constitute an adequate remedy at law for the appellant, and would,

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dismiss on August 5, 1955, and the appellant, before the Government had filed and served its answer to the amended complaint, thereupon filed on August 16, 1955, notice of dismissal of the amended complaint (see affidavit, Appendix B, *infra*). Three days later, and on August 19, 1955, the appellant filed the instant action under 28 U.S.C., Section 2410, naming only the United States as the party defendant. (R. 3-28.)

In these circumstances, it is arguable that the District Court was without jurisdiction here for the additional reason that its order of dismissal in the former action, brought by the same plaintiff against the same defendant and/or defendants—in privity with the defendant in the instant action (Section 7422(c) of the Internal Revenue Code of 1954)—and involving the same taxpayer, taxes and taxable period, is *res judicata* upon the present action. *Cromwell* v. *County of Sac,* 94 U.S. 351; *Jeter* v. *Hewitt,* 22 How. 352; *Hopkins* v. *Lee,* 6 Wheat. 108; *Northern Pacific Railway* v. *Slaght,* 205 U.S. 122, 132; *Manhattan Trust Co.* v. *Trust Co. of North America,* 107 Fed. 328, 332 (C.A. 8th); *Art Metal Construction Co.* v. *United States,* 82 C. Cls. 666; *Foster* v. *The Richard Busteed,* 100 Mass. 409; *Putnam* v. *Clark,* 34 N.J. Eq. 532; compare *Gillespie* v. *Commisioner,* 151 F. 2d 903 (C.A. 10th); and *Leininger* v. *Commissioner,* 86 F. 2d 791 (C.A. 6th).

of course, bar action in a court of equity seeking results in the nature of injunctive relief, as here. *Mercantile Trust Co.* v. *Hofferbert,* 58 F. Supp. 701, 706-707 (Md.). Neither is it clear, nor has the appellant shown, that it could not pay the taxes in question and sue to recover upon the grounds alleged here or perhaps others, under 28 U.S.C., Section 1340 (Appendix A, *infra*), as, indeed, it tacitly concedes it could. (Br. 12-13.)[10]

Neither has the appellant demonstrated that it was not possible for the Government to have acquired a lien prior to the corporate taxpayer's assignment of all its property to it. In fact, the voluntary assignment to the appellant by the insolvent taxpayer of all its assets for the benefit of its unsecured creditors (R. 5, 23-27) thereupon automatically brought Revised Statutes, Section 3466 (Appendix A, *infra*) into play,

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[10] Contrary to the appellant's contention that it "cannot pay the tax and sue for a refund as there is no provision in the law for such procedure" (Br. 15), it is clear that 28 U.S.C., Section 1340, authorizes such suit, as the appellant itself shows (Br. 12-31). But the record shows that the appellant could pay the taxes in question out of the taxpayer's funds in its possession, and collect the amount thereof, plus interest, apparently without suing therefor. Thus, the appellant is specifically authorized "to pay all taxes * * * which could become a lien against [the taxpayer's] said property" assigned to the appellant under the mortgage trust on July 1, 1952 "in the event that said [taxpayer] mortgagor fails, neglects, or refuses to pay [them] * * * as and when they become due * * * and the amount thereof shall be added to the amount due [appellant] otherwise under this mortgage with like interest [6% (R. 13)] thereon" (R. 15-16). And this was confirmed and ratified by the taxpayer's assignment of its accounts and notes receivable to the appellant on July 1, 1952, "in conjunction with and ancillary to that certain mortgage in trust executed and delivered to the" appellant on that date. (R. 22.)

showing that the United States is thereby entitled to priority in payment of the taxes due and owing it by the taxpayer here (R. 5-6, 7). *Price* v. *United States,* 269 U.S. 492, 502-503; *Stripe* v. *United States,* 269 U.S. 503; compare *United States* v. *Butterworth Corp.,* 269 U.S. 504, 513-514. In the *Price* case, the Supreme Court held (pp. 499, 500, 502) that—

> The word "debts" as used in R.S. § 3466 includes taxes.
>
> * * *
>
> * * * § 3466 is to be construed liberally.
>
> * * *
>
> When the [defendant's] assets turned out to be less than the debts, the creditors were entitled to have them dealt with as a trust fund and distributed among them according to their rights and priorities. Under the statute, claims of the United States must first be satisfied.

All of the cases cited by the appellant here—except one (*Tomlinson* v. *Smith,* 128 F. 2d 808 (C.A. 7th)), which is distinguishable and dealt with hereinafter—involved the question of whether property upon which a collector had distrained was property of the taxpayer, or was property of another. None involves the question presented in the instant case, namely, whether the United States is entitled to be first paid from property of the insolvent corporate taxpayer, all of which it has voluntarily assigned to another for the benefit of unsecured creditors. In other words, the appellant's obvious purpose in bringing this second suit is merely to try out and determine the priorities in respect of the property of the taxpayer. Needless

to say, there is a marked difference between a suit to determine the ownership of property upon which a levy has been made and one where, as here, the appellant is asking this Court to decide and resolve the relative priorities of a claim for federeal taxes and the adverse claims of individuals.

The appellant, without actually showing in anywise that the District Court's decision is wrong, and without citing any cases, and we are able to find none, holding that Section 2410 is operative in a suit where the plaintiff disclaims any right in the taxpayer's property involved, as here, nevertheless attempts (Br. 4-7) to distinguish the several cases cited and relied on by the Government and followed by the court below (R. 30). The appellant relies heavily (Br. 9-10) on the Tenth Circuit's decision in *Adler* v. *Nicholas*, 166 F. 2d 647, which, as pointed out, the District Court, upon a thorough consideration, declined to follow on the ground that the several other decisions cited and relied on by the Government are more consistent with the language of the statute (Section 2410) here involved and the legislative history thereof (R. 30-31). We submit that the District Court correctly so concluded, and that the *Adler-Nicholas* case is clearly distinguishable. There the husband and wife were partners in their jewelry business, and the assessments were against the husband individually and against his wife individually. The Court held that as to the interest of the partners in the net proceeds of the partnership, if any, and the interest of the outside party (one Mrs. Evans) in the assets of the partnership as subrogee of the rights

of the creditors, they had such an interest in the partnership property as would permit them to maintain the action there to enjoin the Government from selling the property in violation of their rights therein. The court held (p. 679) that "As to such property, they were not taxpayers" for—

> They stand in the relationship of third parties claiming an interest in property which the Government asserts a right to sell to satisfy an income tax liabiliy of another, and could, therefore, maintain this action to establish their rights, if any, therein.

The court had theretofore stated (pp. 678-679) that—

> One other principle must be kept clearly in mind before we go to a consideration of the precise question in this appeal. A partner's interest in the partnership property is his share of the surplus after all partnership debts have been paid, and that surplus alone is liable for the separate debts of each partner. It, therefore, must follow that the partnership creditors' claims must first be satisfied out of the partnership assets before there was any distributable surplus to the partners to which the Government could look for the satisfaction of the individual tax liability of the partners, and even then it would be limited in its attempt to collect the income taxes due from each partner to his interest in the remaining net proceeds of the partnership.
>
> What we have said as to income taxes does not apply to the Government's claim for excise taxes. These arose by virtue of partnership sales and as to them the Government would have a claim

against partnership assets, and, of course, could perfect a first and prior lien thereto. We do not understand that any of the parties contest the right of the Government to look at the partnership assets for the satisfaction of its excise tax claim.

Substantially to the same general effect is *Jones* v. *Tower Production Co.*, 138 F. 2d 675 (C.A. 10th), decided November 11, 1943,[11] likewise erroneously relied on by the appellant (Br. 5, 8-9), which is also distinguishable. There the court, deciding for the Government, held that the suit for an injunction restraining the collector from levying on the corporate taxpayer's property (oil leases) to satisfy an assessment against the United States where the real question in issue was whether or not the United States ever had a valid lien on such property, and thereupon reversed and remanded for the purpose of bringing the United States in as a party defendant. Thus, the

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[11] There were two other Tower Production Co. cases: *Jones* v. *Tower Production Co.*, 120 F. 2d 779 (C.A. 10th), and *Tower Production Co.* v. *United States*, 61 F. Supp. 411 (W.D. Okla.), decided on May 28, 1941, and July 2, 1945, respectively. In the former, the Tenth Circuit decided in favor of the Government and dismissed the taxpayer's complaint wherein it had sought to be adjudged the owner of the oil property in question, which was subject to a United States tax lien, on the ground that there was neither allegation nor proof of compliance with Section 3679 of the 1939 Code (re civil actions to clear title to realty). In the latter, it finally developed that the District Court, adhering to its previous decision in the same action (45 F. Supp. 593, decided June 27, 1942)—which, as pointed out, had been reversed and remanded (138 F. 2d 675, *supra*)—restrained the collector from prosecuting distraint against the property *not* belonging to the taxpayer for the taxes of another.

critical question there was who was the owner of the disputed property, and the question was resolved by the court's restraining the collector from distraining on the property in question, which did not belong to the taxpayer, for the taxes of another. Hence, it will be seen that that case, and also the *Adler-Nicholas* case, *supra*, both involved the question, as pointed out, whether the property upon which the collector had distrained was property of the respective taxpayers, or the property of others, and that neither involved the question presented here, as pointed out—whether the United States is entitled to be first paid from the insolvent taxpayer's property, all of which it voluntarily assigned to the appellant for the benefit of creditors.

The appellant further cites such cases as *Jones* v. *Kemp*, 144 F. 2d 478 (C.A. 10th), and *Tomlinson* v. *Smith*, 128 F. 2d 808 (C.A. 7th), for example, for the proposition that despite the statutory prohibition against the issuance of injunctions to restrain the collection of federal taxes, some courts "have by-passed the statutes and held them inapplicable", thereby permitting suits by third parties to enjoin the collector from levying on property belonging to a third party to satisfy the tax liability of another. (Br. 7-8.) Those cases are distinguishable. Thus, the *Tomlinson-Smith* case, in which the facts are different and which in any event we submit was erroneously decided, is, as pointed out, the single exception to all the other cases cited by the appellant involving the question whether the property upon which a collector had distrained was the property of

the taxpayer or of others, which, as shown, is not the question involved here. In that case, the Seventh Circuit upheld the District Court's order restraining the Government from issuing or serving any warrant or notice of distraint upon the taxpayer's debtor-customers to collect from them delinquent social security taxes of the taxpayer. It was alleged that the Collector's action in thus harassing the customers threatened to destroy the taxpayer's business and, in such circumstances, the court held that the taxpayer was without an adequate remedy at law. That this case is not applicable to the facts here is shown by the action of the District Court in the appellant's first suit in *Seattle Association of Credit Men* v. *Frank,* 134 F. Supp. 439 (W.D. Wash.), involving the same facts as here. (See Appendix B, *infra.*) There the court below, denying the injunctive relief sought by the appellant and following this Court's decision in *Matcovich* v. *Nickell,* 134 F. 2d 837, 838, in respect of the adequacy or inadequacy of a remedy at law, stated (p. 440):

> The allegations of the complaint in this case do not show an inadequate remedy at law. The showing of inadequacy in *Tomlinson* v. *Smith,* 7 Cir., 128 F. 2d 808 was much stronger than the allegations in the present case. Moreover, the portion of the 7th Circuit opinion dealing with inadequacy of law remedy is not overly persuasive when applied to the facts of the present case.

Hence, we submit that the *Tomlinson-Smith* case, involving different facts, is not only distinguishable but also in any event is wrong.

In *Jones* v. *Kemp, supra,* the Tenth Circuit, holding that homesteads, not being specifically exempt under federal law, are subject to distraint for collection of delinquent taxes regardless of exemptions granted by State law, recognized that while injunctive relief may be granted to protect the interest of third parties in property against which the Collector is proceeding, yet it found from the evidence there that the taxpayer's common law wife—whose illegitimate and unlawful relationship with her putative "husband" had not ripened into a legal marriage under local law prior to the tax lien—had no vested homestead interest in the property at the time the lien attached, and therefore it denied the injunction sought. This case was also distinguished by the court below in the appellant's first suit involving the same facts as here, *supra* (see Appendix B), and upon denying the injunctive relief sought by the appellant there, the court stated as follows (p. 440):

> Undoubtedly, the owner of property may maintain a suit to restrain a levy on his property to satisfy tax liability of others who have no interest in the property under the conditions stated in *Jones* v. *Kemp,* 10 Cir., 144 F. 2d 478. Such situation is not presented in the instant case, even with respect of the funds held by the National Bank of Commerce branch bank. The contracts originally were assigned to the bank for collection. At that time the taxpayer was the owner of the contracts. The complaint alleges that thereafter all ownership and interest in the proceeds of collection of the contracts was fully and finally divested from the taxpayer. It may be so but that

> issue ought not to be adjudicated in an action for injunctive relief in view of the imperative provision of Section 7421 I.R.C. against enjoining collection of internal revenue taxes.

Hence, the *Jones-Kemp* case, as pointed out, comes within the same category of the appellant's other cases involving the question whether the property distrained upon by the Collector was the property of the taxpayer or that of another, and not the question here presented.

As to the Government's cases relied on by the District Court in deciding the instant case (R. 30), it will be noted that the appellant emphasizes and treats two of them (*Metropolitan Life Ins. Co.* v. *United States,* 107 F. 2d 311 (C.A. 6th), and *Integrity Trust Co.* v. *United States,* 3 F. Supp. 577 (N.J.)), as being inapplicable to the facts here because they were decided before the 1942 amendment to the Act of March 4, 1931, *supra* (Br. 4, 5). But the later case of *Borough of Kenilworth* v. *Corwine,* 96 F. Supp. 68 (D.C. N.J.), decided on March 7, 1951, long after that amendment, which the appellant has been unable to distinguish (Br. 5), and where the same District Court of New Jersey followed its previous decision in the *Integrity Trust Co.* case, fully negatives the appellant's contention of inapplicability of the latter here. In the *Borough of Kenilworth* case, the District Court, holding that the action must be dismissed because the jurisdictional requirements of 28 U.S.C., Section 2410 (involved here), had not been met, stated (p. 69):

> Plaintiff instituted this action in the Superior Court of New Jersey, seeking strict foreclosure of fifteen tax sale certificates. The United States having removed the action to this court under the provisions of section 1444 of the Judicial Code, 28 U.S.C.A. § 1444, moves to dismiss on the ground that the jurisdictional requirements of Title 28 U.S.C.A. § 2410, are not met.
>
> Under a statute formerly in effect, substantially similar to that embodied in 28 U.S.C.A. § 2410, Judge Avis of this court held that consent to be sued in a strict foreclosure proceeding had not been given by the United States, since the statute contemplated a judicial sale. *Integrity Trust Co.* v. *United States,* D.C. N.J., 1933, 3 F. Supp. 577. The United States, of course, cannot be made subject to suit unless the terms of its consent are strictly complied with. It follows, therefore, that this action must be dismissed as to the United States, * * *.

In *Miners Sav. Bank of Pittston, Pa.* v. *United States,* 110 F. Supp. 563 (M.D. Pa.), in which the bank brought an action to quiet title to property against which the United States had a recorded income tax lien, the court held (pp. 571-572) that the bank had another remedy under 28 U.S.C., Section 2410(a), pursuant to which, under the predominant authorities (p. 571, fn. 24),[12] "the court could grant no relief

---

[12] These comprised the following cases: *Metropolitan Life Ins. Co.* v. *United States,* 107 F. 2d 311 (C.A. 7th), certiorari denied, 310 U.S. 630; *Integrity Trust Co.* v. *United States,* 3 F. Supp. 577 (N.J.) and *Borough of Kenilworth* v. *Corwine,* 96 F. Supp. 68 (N.J.), all followed by the District Court here (R. 30); and also *Sherwood* v. *United States,* 5 F. 2d 991, 993 (E.D. N.Y.); *Fox* v.

except to order a sale". As against this, the court stated (pp. 571-572, fn. 24, par. 2) "The other [minority] view"[13] whereby it was purportedly not required to order a sale *when the value of the property is insufficient to satisfy even the private lienor, much less the tax lien,* but may in such case order cancellation of the tax lien. In this connection, the court stated (p. 572):

> * * * we see no good reason why this court, as a court of equity, should not exercise its power by finally establishing the legal relations of the parties to the property in question, although this is the first case, so far as our research has revealed, to grant such relief since the 1942 amendment. Cf. *Bank of America Nat'l Trust & Saving Ass'n* v. *United States, supra.* Such a conclusion is not only supported by the foregoing but rests upon sound principles of remedial justice.

Queens County Sales Co., Inc., 52 F. 2d 794, 795 (E.D. N.Y.); *Ormsbee* v. *United States*, 23 F. 2d 926 (Fla.); *Ford Bros. & Co.* v. *Eddington Distilling Co.*, 30 F. Supp. 213 (M.D. Pa.).

[13] The three cases—two by way of comparison—cited by the District Court as representing "The other [minority] view" comprises the following: *Oden* v. *United States*, 33 F. 2d 553 (W.D. La.); and cf. *Trust Co. of Texas* v. *United States*, 3 F. Supp. 683 (S.D. Texas); *Minn. Mut. Life Ins. Co.* v. *United States*, 47 F. 2d 942 (N.D. Texas). An examination of the *Oden* case, for example, however, discloses that all it held was that a mortgagee first in right could prevent a sale of the property involved, and in lieu thereof obtain a decree ordering the cancellation of the Government's tax lien in so far as it rests upon or affects title to the particular property only, but that it should remain of record against any other property of the tax debtor. The other two cases are substantially to the same effect.

The District Court thereupon ordered the entry of a decree consistent therewith. It is not clear, however, how the latter result supports the appellant's rather than the Government's position because "no judicial sale was found necessary", as the appellant claims (Br. 7), for to have done otherwise under the circumstances there would, as the District Court itself put it (p. 571, fn. 24), have been "a vain and useless thing." Moreover, an examination of the so-called minority view decisions cited by the District Court there (p. 571-572) do not stand for what it claimed therefor. (See fn. 13, *supra.*)

B. The District Court Did Not Have Jurisdiction Under 28 U.S.C., Sections 1340, 1346(a)(2) and/or 2463

The appellant, having relied solely on 28 U.S.C., Section 2410, in the District Court (R. 49), now invokes additionally for the first time upon appeal the provisions of 28 U.S.C., Section 1340, 1346(a)(2) and/or 2463 (Appendix A, *infra*), as bearing on jurisdiction here. (Br. 1, 3.) The contention is that if more than Section 2410 is needed for jurisdiction, it is provided by the three additional sections above mentioned. (Br. 12-13.) We submit that this contention is without merit.

In the first place, this issue was neither alleged in the appellant's complaint in the District Court (R. 3-28), nor is it shown by the appellant to have been presented to or considered by the court below (R. 29-32). Hence, the District Court had no basis or occasion to pass on it. Neither was this point assigned as error by the appellant upon appeal (Br. 2) nor included in its statement of points in-

tended to be relied on upon appeal (R. 35). Accordingly, this Court is not called upon to decide the issue but rather, under the authorities, is duty bound to pass it. *Helvering* v. *Salvage,* 297 U.S. 106; *General Utilities Co.* v. *Helvering,* 296 U.S. 200, 206; *Harvey* v. *Commissioner,* 171 F. 2d 952, 955 (C.A. 9th); *Popular Price T. Co.* v. *Commissioner,* 33 F. 2d 464 (C.A. 7th); *Hanby* v. *Commissioner,* 67 F. 2d 125 (C.A. 4th).

Next, if this Court should nevertheless decide to consider the issue, the following is submitted. From the jurisdiction of federal courts to render declaratory judgments, judgments with respect to federal taxes are specifically excepted under 28 U.S.C., Section 2201 (Appendix A, *infra*). Nor would the court below have had jurisdiction under the provisions of 28 U.S.C., Section 2410, even if supplemented by Sections 1346(a)(2) and/or 2463, as claimed by the appellant. (Br. 1, 3, 12-13). Section 1346(a)(2) gives the District Courts jurisdiction of any *other* civil action—than one against the United States for the recovery of any internal revenue tax, penalty, etc., alleged to have erroneously or illegally assessed or collected, within specified amounts, under subdivision (a)(1) thereof—or claim against the United States, within specified amounts, founded either upon the Constitution or any Act of Congress enacted thereunder, etc. Section 2463 provides that all property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United

States having jurisdiction thereof. It is clear that if the District Court here had had jurisdiction under those sections, then it would have had jurisdiction to enjoin the collection of internal revenue taxes, which is strictly prohibited by Section 7421 of the 1954 Code. (Appendix A, *infra.*) And it would also have had jurisdiction to declare judgments in respect of federal taxes which, as pointed out, is specifically excepted from the statute (28 U.S.C., Section 2201) providing for declaratory judgments.

In *Noland* v. *Westover,* 172 F. 2d 614, this Court, affirmed the action of the District Court in granting the Collector's motions for summary judgments of dismissal of the taxpayer's suit for an injunction against the Commissioner, holding (p. 615) that upon relief being asked for a declaratory judgment, the District Court has no jurisdiction, under 28 U.S.C., Section 2201, to render such judgment in controversies in respect of tax problems in favor of the taxpayer. And as the Seventh Circuit said in *Tomlinson* v. *Smith,* 128 F. 2d 808, in this connection (p. 811)—

> * * * it is our view that the language which excepts federal taxes from the Declaratory Judgment Act is co-extensive with that which precludes the maintenance of a suit for the purpose of restraining the assessment or collection of a tax.

In *Filipowicz* v. *Rothensies,* 31 F. Supp. 716 (E.D. Pa.), the District Court granted the Government's motion to dismiss the plaintiff's petition for a declaratory judgment adjudicating the question of ownership of the distributions made by the bankrupt

estate, the Government and the plaintiff claiming title by virtue of a tax lien and an alleged prior assignment from the bankrupt, respectively. The court stated (p. 721) that if it was at all possible for the United States to have acquired a lien prior to the assignment in question, the complaint must be dismissed for failure to have alleged that such a lien actually was not established.[14] Likewise, the appellant's complaint here failed to allege that a lien, though possible for the United States to have acquired prior to the taxpayer's assignment of its property to the appellant for the benefit of its creditors, actually was not established here (R. 3-34), and therefore the complaint was properly dismissed (R. 31-32).[15]

The appellant complains that the funds now in its hands are as effectively detained as if the Director had them in his possession, and since it can not disburse them to the taxpayer's creditors until the Director's levy is lifted, Section 2463 provides addi-

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[14] In the later case between the same parties after amendment to the complaint (43 F. Supp. 619 (E.D. Pa.)) and additional intervention was granted when the court rendered a declaratory judgment in favor of the Collector, holding the United States an unnecessary party, the court ruled (p. 622), upon the authority of *Rothensies* v. *Ullman,* 110 F. 2d 590, 592 (C.A. 3d), that 26 U.S.C., Section 3653, does not operate to deprive the District Courts of the United States "of jurisdiction to restrain revenue officers from illegally collecting taxes out of property which does not belong to the person indebted to the government".

[15] In fact, the record discloses that the Government is asserting a lien for taxes for a period (calendar quarter ended March 31, 1953) during which the taxpayer was operating its business and before the taxpayer's assignment to the appellant in lieu of foreclosure was made. Compare *United States* v. *Lankford,* 3 F. 2d 52 (E.D. Va.).

tional jurisdiction if more than that provided by Section 2410 is needed, citing, as "A case [allegedly] in point", *Gerth* v. *United States,* 132 F. Supp. 894 (S.D. Calif.). (Br. 12.) There the District Court held that it had jurisdiction of the non-taxpayer's action to quiet title to property allegedly taken from his possession by the taxpayers and subsequently acquired by the Government as security for the taxpayer's taxes, and that the court could enter whatever judgment was required, not only against the Government and its officers but also against the taxpayers. Thus, this case, far from being in point, is merely another example of the many cases cited by the appellant, all of which, as pointed out, involved the question of whether the property upon which the Collector had distrained was the property of the taxpayer or the property of another, and does not touch the question involved here, as heretofore shown.

Finally, under 28 U.S.C., Section 1340, the District Courts have jurisdiction of any civil action arising under any Act of Congress providing for internal revenue. The appellant contends that the provisions of that section will suffice, if more than Section 2410 is needed to supply jurisdiction here, at least where taxes of any kind are involved, citing *Colorado Milling & Elevator Co.* v. *Glenn,* 118 F. Supp. 943 (Ky.). (Br. 12-13.) There the plaintiff Colorado Milling and Elevator Company, the third party claimant which claimed ownership of the property (funds in bank) seized under a warrant of distraint for the payment of the tax liability of taxpayer Koehler-Spalding Company, was allowed to sue the

Director to recover the property levied upon by the United States for the tax claim against the taxpayer, the plaintiff's consignee, which the court held was the real owner of the property seized rather than a mere agent or factor of the third party claimant as claimed by the latter. Thus, that case, like the many others cited by the appellant, involved the question whether the property (funds deposited in the bank) levied upon and seized was the property of the taxpayer or was the property of another, the third party claimant —not the question presented in the instant case— and it is to be noted that the court there found that they belonged to the taxpayer, and that the Collector's action was proper. Hence, that case clearly does not help the appellant. Rather, appellant's proper recourse was—and still is—to pay over upon demand and sue to recover under Section 1340, as heretofore pointed out. (See fn. 10, *supra.*)

In view of the foregoing, we submit that the District Court did not err in holding that it did not have jurisdiction of this suit praying that the Director's levies be removed from the insolvent taxpayer's property, assigned to the appellant for the benefit of its creditors, in which the appellant disclaims any interest.

CONCLUSION

The judgment (order of dismissal) of the District Court is correct and should therefore be affirmed upon review by this Court.

Respectfully submitted,

CHARLES K. RICE,
Assistant Attorney General.

LEE A. JACKSON,
A. F. PRESCOTT,
S. DEE HANSON,
Attorneys,
Department of Justice,
Washington 25, D. C.

CHARLES P. MORIARTY,
United States Attorney.

EDWARD J. MCCORMICK, JR.,
Assistant United States Attorney.

June, 1956.

APPENDIX A

28 U.S.C.:

§ 1340. *Internal revenue, customs duties*

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court.

§ 1346. *United States as defendant*

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * *

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

* * *

§ 2201. *Creation of remedy*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 2410. *Actions affecting property on which United States has lien*

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, including the District Court for the Territory of Alaska, or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint shall set forth with particularity the nature of the interest or lien of the United States. * * *

(c) A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law of the place where the property is situated. A sale to satisfy a lien inferior to one of the United States, shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first

lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head of the department or agency of the United States which has charge of the administration of the laws in respect of which the claim of the United States arises.

(d) Whenever any person has a lien upon any real or personal property, duly recorded in the jurisdiction in which the property is located, and a junior lien, other than a tax lien, in favor of the United States attaches to such property, such person may make a written request to the officer charged with the administration of the laws in respect of which the lien of the United States arises, to have the same extinguished. If after appropriate investigation, it appears to such officer that the proceeds from the sale of the property would be insufficient to wholly or partly satisfy the lien of the United States, or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforceable, such officer shall so report to the Comptroller General who may issue a certificate releasing the property from such lien.

§ 2463. *Property taken under revenue law not repleviable*

All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.

Revised Statutes:

> Sec. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

Internal Revenue Code of 1939:

> SEC. 3710. SURRENDER OF PROPERTY SUBJECT TO DISTRAINT.
>
> (a) *Requirement.*—Any person in possession of property, or rights to property, subject to distraint, upon which a levy has been made, shall, upon demand by the collector or deputy collector making such levy, surrender such property or rights to such collector or deputy, unless such property or right is, at the time of such demand, subject to an attachment or execution under any judicial process.
>
> (b) *Penalty for Violation.*—Any person who fails or refuses to so surrender any of such property or rights shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes (including penalties and interest) for the

collection of which such levy has been made, together with costs and interest from the date of such levy.

(c) *Person Defined.*—The term "person" as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

(26 U.S.C. 1952 ed., Sec. 3710.)

Internal Revenue Code of 1954:

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax.*—Except as provided in sections 6212(a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

(b) *Liability of Transferee or Fiduciary.*—No suit shall be maintained in any court for the purpose of restraining the assessment or collection (pursuant to the provisions of chapter 71) of—

(1) the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any internal revenue tax, or

(2) the amount of the liability of a fiduciary under section 3467 of the Revised Statutes (31 U.S.C. 192) in respect of any such tax.

(26 U.S.C., 1952 ed., Supp. II, Sec. 7421.)

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

Civil No. 3992

SEATTLE ASSOCIATION OF CREDIT MEN, a corporation,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA, *Defendant.*

STATE OF WASHINGTON
COUNTY OF KING } ss.

THOMAS R. WINTER, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the defendant in the above-entitled action;

That on or about October 5, 1954, the plaintiff above named brought an action against William E. Frank, District Director of Internal Revenue for the District of Alaska and Washington, entitled "Seattle Association of Credit Men, a corporation, Plaintiff, vs. William E. Frank, Director of Internal Revenue for the District of Alaska and Washington, and the United States of America, Defendants", Civil No. 1840, which action was brought in the Southern Division of this Court;

That the allegations contained in each and every paragraph of the complaint and amended complaint of cause of action No. 1840, referred to above, are identical with each and every allegation contained in the paragraphs of this action, with the exception of paragraphs Nos. XVI and XVII [in amended complaint filed May 9, 1955, same as pars. XIV and XV in

original complaint filed October 5, 1954] of cause of action No. 1840, which read as follows:

"XVI. [XIV]

Defendant is empowered by virtue of the Internal Revenue Laws of the United States to make a seizure of the property in the hands of the plaintiff and the National Bank of Commerce. If such seizure is made, the creditors of Western Appliance Co., Inc., who have filed claims with the plaintiff, will be unjustly and improperly deprived of moneys belonging to them. The refusal of defendant to release said levies has already caused substantial injury to said creditors in that dividends have been tied up, thereby depriving said creditors of working capital. Plaintiff has also been damaged in that the creditors it represents has lost confidence in the ability of plaintiff to effect an orderly and speedy liquidation of the assets covered by the trust mortgage.

"XI.

No adequate legal remedy exists to try title to said funds, and plaintiff has exhausted all administrative remedies available. Unless the defendant is restrained permanently from enforcing said levies, further damage will ensue to the plaintiff and to the creditors who have filed claims with the plaintiff.

WHEREFORE, plaintiff prays that the defendant, his successors and employees, be permanently enjoined from enforcing the levies hereinabove referred to."

That the defendant William E. Frank in cause of action No. 1840 filed a motion to dismiss the action, and

on April 29, 1955, the Honorable George H. Boldt, one of the judges of the above-entitled Court, granted the defendant's motion for dismissal and entered an order thereon; that attached hereto and made a part hereof is a copy of the memorandum opinion of the Court, not yet officially reported but which may be found at paragraph 72,784 of 1955 Prentice-Hall Federal Tax Service [now reported in 134 F. Supp. 439];

That subsequently, and on or about May 19, 1955, the plaintiff caused to be served on the United States Attorney and the Attorney General of the United States of America, a copy of a summons with an amended complaint in cause of action No. 1840. The so-called amended complaint was a continuation of the old action although the order entered by the Court on April 29, 1955, did not grant the plaintiff leave to plead over. The amended complaint differed from the previous complaint only in that the United States of America was made a party and the plaintiff prayed that if the injunctive relief could not be granted upon it, that the plaintiff have alternate relief against the United States of America under Title 28, U.S.C.A., Sec. 2410, by treating the action as one to remove a cloud upon title;

That the defendants William E. Frank and the United States of America filed a motion to dismiss the the complaint, as amended [filed on or about May 9, 1955], and subsequently, and on or about August 16, 1955, the plaintiff filed a Notice of Dismissal of that action, which Notice of Dismissal reads as follows:

> The plaintiff, Seattle Association of Credit Men, herewith gives notice of dismissal of the above entitled action before service of Answer by the defendants, said dismissal to be without prejudice.

That the relief now sought by the plaintiff in the pending action is between the same parties and is the same primary relief sought by the plaintiff in the action, No. 1840, which was dismissed.

/s/ THOMAS R. WINTER

SUBSCRIBED AND SWORN to before me this [on or about 14th] day of November, 1955.

.....

Notary Public in and for the State of Washington, residing at Seattle

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No. 15042

United States Court of Appeals
For the Ninth Circuit

SEATTLE ASSOCIATION OF CREDIT MEN, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, *Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

APPELLANT'S REPLY BRIEF AND MOTION TO AMEND

CROSON, JOHNSON & WHEELON,
WILLARD HATCH,
Attorneys for Appellant.

900 United Pacific Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

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Attorneys for Appellant.

900 United Pacific Building,
Seattle 4, Washington.

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United States Court of Appeals
For the Ninth Circuit

SEATTLE ASSOCIATION OF CREDIT MEN, a corporation, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee*.	No. 15042

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

APPELLANT'S REPLY BRIEF AND MOTION TO AMEND

Jurisdiction

Appellee, in its brief (pps. 31-32), argues that this court cannot consider jurisdictional grounds not stated in the Complaint (Tr. 4) and further contends that the issue was not assigned as error nor included in the statement of points on appeal.

As appears from Appellant's Brief (p. 2) the sole specification of error was upon the dismissal for want of jurisdiction.

As appears from the Record (Tr. 35), the sole point on which appellant relies in this appeal is the error in dismissing for want of jurisdiction.

Appellant concedes that certain jurisdictional statutes, now relied upon in this appeal, were not included

in its Complaint. Therefore, to cure this defect, if it be one, appellant moves, pursuant to 28 U.S.C. §1653, for leave to amend paragraph III of its Complaint (Tr. 4) to include as jurisdictional grounds all the statutes cited in the first paragraph of its statement of Jurisdiction (Br. 1) upon such terms as this court may impose. *Ohio v. Swift*, 270 Fed. 140; *Swayze v. Barsch*, 226 Fed. 581; *Keene Lumber Co. v. Leventhal*, 165 F. (2d) 815.

Appellant submits, that to grant such motion would not inconvenience appellee, as the latter has fully replied to this subject matter in its brief and takes the position that the lower court decided this case correctly, regardless of the particular jurisdictional ground involved.

Further, none of the cases cited by appellee on the subject of whether this court can hear the issue are applicable. All are appeals from the Tax Court or the Board of Tax Appeals. All involved cases where entirely different issues were raised on appeal from those heard by the board. Here, the only issue is jurisdiction.

Adequate Remedy

On at least two occasions in its brief (pps. 9, 19), appellee states that appellant's Complaint is defective because there is no showing that appellant's remedies at law are inadequate.

First, appellant knows of no reason why such allegation is necessary in this action, it not being an action for an injunction.

Second, appellee states that appellant's remedies are not inadequate because appellant can sit back and wait for the United States to bring suit under §3710 of the Internal Revenue Code of 1939 (Br. 9, 19). Please note, in this connection that the United States was most careful to state that it would "probably" be required to sue. This is exactly what appellant complains of. The United States does not want to sue because it does not want an adjudication on the merits.

Next, the appellee states that appellant has a remedy in 26 U.S.C. §1340 by paying upon demand and suing for a refund (Br. 9, 20, 36). *Adler v. Nicholas,* 166 F. (2d) 674, held distinctly that a non-taxpayer cannot sue for refund of taxes collected in such circumstances (Appellant's Br. 9, 10). See also *Stuart v. Chinese Chamber of Commerce* (9th Cir.) 168 F.(2d) 709.

Misconceptions

The essence of appellee's whole argument is that the present suit will not lie because it does not involve a question of whether the property levied upon was the property of the taxpayer or the property of some third party non-taxpayer (Br. 10, 21, 22, 25, 26, 28, 35, 36). Yet in fact that is exactly what this suit does involve (Tr. 3-28) (Appellant's Br. 1-2). Thus appellant's citations are germane to that subject, as appellee concedes.

Appellee attempts to turn this case into a question of priorities. To do so, it refers to that as the sole issue (Br. 10, 17, 18, 21, 25) by labeling appellant's Bill of Sale in Lieu of Foreclosure (Tr. 5, 23-27) an assign-

ment for the benefit of creditors. Apparently on the theory that if you call a Bill of Sale an "Assignment for the Benefit of Creditors" long enough, it will become an assignment, the appellee refers to the Bill of Sale as an assignment for the benefit of creditors on eleven different occasions (Br. 2, 9, 10 (2) 11, 18, 20, 21, 25, 34, 36).

Appellant concedes at this point that if the Bill of Sale were an Assignment for the Benefit of Creditors, and if the mortgage merged into the Bill of Sale, then the United States would be prior and there would have been no lawsuit and there would have been no appeal. Even the appellant recognizes the force of Rev. Stat. § 3466 under such circumstances.

But to call the Bill of Sale an "assignment" without ever receiving an adjudication thereon, and then making one's whole argument on that theory is nothing more than bootstrap lifting.

The same is true of the argument (Br. 9, 20, 34) that appellant failed to allege that appellee's lien could not have been acquired prior to the "assignment." If the Bill of Sale were an assignment, there would be no lawsuit. But this case does not involve priorities; it does involve the question of whose property was the levy made upon. The issue of whether the Bill of Sale was an assignment was not determined in the lower court. The action was treated solely as a jurisdictional question (Tr. 30-32).

Finally, appellant wonders where appellee gets the conception that appellant disclaims any interest in the

subject property (Br. 9, 15). Such is not true, and saying so does not make it so. Appellant claims ownership of the property clearly and unequivocally (Tr. 4, 9).

To make its ownership position clear, appellant sets out the following table:

a) July 1, 1952—trust mortgage to appellant by Western Appliance Co. (Tr. 4).

b) July 1, 1952—assignment of accounts receivable to appellant by Western Appliance (Tr. 4).

c) July 1, 1952—notice of assignment of accounts receivable to Secretary of State (Tr. 4-5).

d) July 3, 1952—recordation of (a) with County Auditor.

e) March 27, 1953—appropriation of bank reserve account (Tr. 7).

f) March 31, 1953—accrual of U.S. taxes for 1st quarter, 1953 (Tr. 5).

g) June 2, 1953—foreclosure of (a) by Bill of Sale (Tr. 5).

h) June 5, 1953—recordation of (g) (Tr. 5).

i) Between June 2, 1953 and June 15, 1953—sale of assets covered by Bill of Sale by appellant (Tr. 5).

j) June 15, 1953—lien of U.S. taxes recorded (Tr. 6).

k) June 15, 1953—levy on appellant for (j) (Tr. 5).

l) June 18, 1953—levy on N.B. of C. for (j) (Tr. 7).

From the foregoing, it should be perfectly clear that appellant claims ownership of the funds in question, which ownership ripened on June 2, 1953, at the latest, and that appellee's subsequent lien and levy on June 15, 1953, became a cloud on such funds thereafter.

Conclusion

Appellee seems to predicate its argument on the theory that, were this a suit to determine the ownership of the funds in question (which it is), then the district court would have had jurisdiction, but since the Bill of Sale vesting title in appellant was actually an assignment for the benefit of creditor (which is the undecided issue on the merits), and thus the suit is one to determine priority (which it is not), the lower court had no jurisdiction under §2410 or any other statute (which appellant would concede if the Bill of Sale were an assignment).

In effect, by presuming that the lower court would decide the real issue of this case (to-wit: ownership of the funds) in its favor (for which finding the lower court had jurisdiction) appellee arrives at the conclusion that the lower court did not have jurisdiction because the property subject to the levy was actually the property of the taxpayer in the hands of an assignee for the benefit of creditors and therefore the issue is one of priority, not title.

In short, the argument of the United States, according to all rules of logic, begs the entire question of jurisdiction by presuming a ruling on the key fact (ownership) which has never been decided and over which issue the appellee virtually concedes the district court had jurisdiction (Br. 10, 21, 22, 25, 26, 28, 35, 36). [E.G.: Suppose $x + 1 = y$. If $x = 2$, $y = 3$. But how do we know $x = 2$?]

Lest there be any doubt as to appellant's position, appellant contends that this suit is one to decide

whether the Director has levied upon the property of the taxpayer or the property of appellant, upon which point both appellee and appellant agree that all of appellant's citations are in point.

Appellant itself indulged in the mumbo-jumbo of double-talk in its brief (pps. 13-14) when it discussed the issues. Actually the issue of priority does not exist until after a decision is made on ownership. To state the issues in the alternative was erroneous.

Wherefore, appellants prays as follows:

(1) That its motion for leave to amend be granted.

(2) That the order of dismissal be reversed and that the matter be remanded for trial.

Respectfully submitted,

CROSON, JOHNSON & WHEELON,
WILLARD HATCH,
Attorneys for Appellant.

900 United Pacific Building,
Seattle 4, Washington.

No. 15055

United States
Court of Appeals
For the Ninth Circuit

BEAUMONT SILVERTON, Individually and as a Member Representative and Secretary of Teamster Local Union No. 898, Affiliated With the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and the American Federation of Labor,

Appellant,

vs.

VALLEY TRANSIT CEMENT COMPANY, INC., a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-27-56

FILED

MAY -8 1956

TERMS AND CONDITIONS

1. Contract Between Buyer and Seller: The terms and conditions herein set forth, together with those relating to specifications, quantity, price, freight allowance, delivery dates and shipping, packing, and invoicing instructions and those special terms and conditions attached, if any, shall constitute the entire contract between Buyer and Seller with respect to the subject matter thereof, and said contract shall not be amended, modified or rescinded except by written agreement signed by an officer or authorized official of each company, expressly referring to this contract.

2. Delays: Seller shall not be responsible for any failure or delay in delivery due to fires, floods, strikes or labor troubles of any kind whether or not due to fault of Seller, breakdowns, delay of carriers, total or partial failure for any reason of usual sources of supply, limited production, precedence or priorities given at the request or for the benefit, directly or indirectly, of any government or any subdivision, agency or instrumentality thereof, laws, regulations or restrictions of any government or any subdivision, agency or instrumentality thereof, or any similar or dissimilar cause beyond Seller's control. For any cause whatsoever, whether beyond Seller's control or not, Seller's liability for failure or delay in delivery, shall exclude consequential damages and shall not exceed the smaller of the following: (1) the difference between the price applicable hereunder to the material with respect to which such failure or delay in delivery is experienced and the established market price of such material in like quantities as specified hereon at the date on which delivery is required hereunder if such market price is higher than the said price applicable hereunder, or (2) five percent (5%) of the price applicable hereunder to such material. Any course of dealing between the parties to the contrary notwithstanding, at Seller's election any claim for failure or delay in delivery shall be deemed waived by Buyer unless presented in writing to Seller within thirty (30) days from the date on which delivery is required hereunder. In the event of inability of Seller for any cause beyond Seller's control to supply the total demands for any material specified in this order, Seller may allocate its available supply among any or all Buyers, including subsidiaries, affiliates and departments of Seller, on such basis as Seller, in its sole discretion may decide upon, without liability for any failure to perform this contract which may be a consequence thereof.

3. Tolerance: This total order and each delivery hereunder shall be subject to a tolerance of ten percent (10%), plus or minus, in yield and quantity.

4. Shipping Dates: Unless a definite requested shipping date is shown on the face of the purchase order, Buyer shall furnish such date upon notice from Seller. In the event that shipment dates are requested by Buyer after issuance of its purchase order, such shipment dates shall be subject to Seller's approval.

5. Warranty: Seller undertakes that products sold hereunder to Buyer shall be free from defects in material and workmanship and shall conform to specifications. This express warranty is in lieu of and excludes all other warranties, guaranties or representations, express or implied, by operation of law or otherwise. Upon receipt of definite shipping instructions, Buyer shall return all defective material, or material not conforming to specifications, to Seller, after inspection by Seller, or at Seller's election, subject to inspection by Seller. Material returned by Buyer must be returned in same condition as when received by Buyer. Defective material, or material not conforming to specifications, as returned shall be replaced or repaired by Seller without any additional charge, or, in lieu of such replacement or repair, if Seller so desires, Seller may refund the purchase price applicable to such material. Seller agrees to pay return transportation charges not exceeding those which would apply from original destination on all defective material, or material not meeting specifications. However, Seller shall not be obligated for such charges when material returned proves to be free from defect and to meet specifications. Material which proves to be free from defect and to meet specifications shall be held by Seller for shipping instructions and Buyer shall furnish such instructions promptly upon request. Seller's liability shall be limited solely to the replacement or repair of any defective material, or material not meeting specifications, or to refunding the purchase price applicable to such defective material or material not meeting specifications. Seller shall not be liable for any consequential damages nor for loss, damages or expenses directly or indirectly arising from the use of the material including, without limitation, warehousing, labor, handling and service charges not expressly authorized by Seller and the, equipment and machine breakage. Any course of dealing between the parties to the contrary notwithstanding, at Seller's election any claim shall be deemed waived by Buyer unless presented in writing to Seller within sixty (60) days from the date of the receipt of the material to which such claim relates.

6. Advice by Seller: The giving or failure to give advice, notice, suggestions, instructions, or recommendations of any character by Seller, including but not limited to, any regarding designs, color, shapes, sizes, alloy, temper, specifications, or wording on, or use or characteristics or suitability of material sold to Buyer shall not impose any liability upon Seller nor grant to Buyer any license to the use of any of Seller's patents, trade-marks or trade names.

7. Credits: All shipments to be made hereunder shall at all times be subject to the approval of Seller's Credit Department, and if the financial responsibility of Buyer is unsatisfactory, or becomes impaired, or if Buyer fails to make any payment in accordance with the terms of the contract, then, in any such event, Seller may defer or decline to make any shipments hereunder except upon receipt of satisfactory security or cash payments in advance, or it may terminate the contract. Terms of payment shall be as set forth on the face hereof.

8. Assignment: This contract, together with all rights, liabilities and obligations arising thereunder, may be assigned wholly or in part by Seller to any one or more of the corporations subsidiary to or affiliated with Seller, without the necessity of prior notice to Buyer.

9. Taxes: In addition to the price specified herein, the amount of any present or future sales, use, excise or other tax applicable to the sale, manufacture, delivery, use, and or other handling of material hereunder or of any component part thereof, shall be paid by the Buyer, or in lieu thereof the Buyer shall provide Seller with a tax-exemption certificate acceptable to the taxing authorities and Buyer agrees to indemnify and hold harmless Seller of and from all loss, damage or liability occasioned by or arising out of Buyer's failure or delay in paying such tax, or providing such certificates.

10. Changes: Seller assumes no responsibility for any changes in the specifications outlined in the original order, unless such changes are confirmed in writing by Buyer and accepted in writing by Seller. Any price variation resulting from such changes shall become effective immediately upon the acceptance of such changes.

11. Price: (a) The price specified in this contract for any material or articles which are now or hereafter covered by a published list price of Seller may be changed by Seller at any time upon written notice to Buyer to conform with Seller's published list price current at the effective date of change. (b) The price specified in this contract for any material or articles which are not covered by any published list price of Seller may be increased by Seller upon twenty (20) days written notice to Buyer. In the event Buyer is not willing to accept such increase pursuant to this subparagraph (b), Buyer shall so notify Seller in writing within seven (7) days from receipt of the notice of the increase and that portion of this order to which such price increase is applicable shall be deemed canceled unless within seven (7) days from receipt of Buyer's notice, Seller gives written notice of its election to withdraw the proposed increase.

12. Equipment: Any equipment (including jigs, printing plates or cylinders, dies and tools, but excluding patterns) which Seller constructs or acquires specifically for use on Buyer's order shall be and remain Seller's property and in Seller's sole possession and control, and any charges made by Seller therefor shall be for the use of such equipment only. All such equipment will be used exclusively for the manufacture of products for Buyer. When for a period of one (1) year no orders are accepted from Buyer for products to be made with such equipment, Seller may make such use or disposition thereof as it desires without liability to Buyer. Such equipment or any material owned or furnished by Buyer while in Seller's possession will be carefully handled and stored by Seller, but Seller shall have no responsibility for loss or damage thereto. Tool charges designated as estimated will vary in accordance with actual cost.

13. Patents: If any material shall be manufactured or sold by Seller to meet Buyer's specifications or requirements and is not a part of Seller's standard line offered by it to the trade generally in the usual course of Seller's business, Buyer agrees to defend, protect and save harmless Seller against all suits at law or in equity and from all damage, claims and demands for actual or alleged infringement of any United States or foreign patent and to defend any suits or actions which may be brought against Seller for any alleged infringement because of the manufacture or sale of any such material.

14. Point of Delivery: Delivery to carrier at point of shipment shall constitute delivery to Buyer and Buyer shall assume all risk for subsequent loss or damage. The fact that in some instances a different "F O B" point may be shown on the face hereof, or that all or a part of freight charges may be prepaid, assumed, or allowed by Seller, is for Buyer's convenience and shall not affect the fact that delivery to carrier at point of shipment shall constitute delivery to Buyer.

15. Waivers: No waiver by Seller of any breach of any provision hereof shall constitute a waiver of any other breach or of such provision. Seller's failure to object to provisions contained in any communication from Buyer shall not be deemed an acceptance of such provisions or as a waiver of the provisions of this contract.

16. Cancellation: This contract is subject to cancellation only upon Seller's accepting such cancellation in writing, and the effective date of such cancellation shall be the date of such acceptance. The date of such acceptance notwithstanding, Seller shall have the right to continue the processing of the materials or articles affected to the point at which the processing can be halted with the least inconvenience to Seller under the circumstances. In the event of acceptance of cancellation, at Seller's election Seller may assess cancellation charges against Buyer, which charges shall consist of the expenses incurred by Seller to the date of acceptance of cancellation and or the date of the halting of processing, plus the profit anticipated by Seller on the canceled portion of the order, less allowance for scrap at the price then currently paid by Seller for scrap of the type resulting from the cancellation of the order. Payment of cancellation charges shall be made by Buyer upon receipt of statement of same. Cancellation charges shall not exceed the purchase price of the canceled portion of the contract.

No. 15055

United States
Court of Appeals
For the Ninth Circuit

BEAUMONT SILVERTON, Individually and as a Member Representative and Secretary of Teamster Local Union No. 898, Affiliated With the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and the American Federation of Labor,

Appellant,

vs.

VALLEY TRANSIT CEMENT COMPANY, INC., a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-27-56

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

Attorney for Appellant:

JOHN A. STEVENSON,
LIONEL RICHMAN,
756 South Broadway.
Los Angeles 14, California.

Attorney for Appellee:

HORTON & KNOX,
JAMES H. CARTER.
895 Broadway.
El Centro, California.

In the District Court of the United States in and for the Southern District of California, Southern Division

No. 1485

BEAUMONT SILVERTON, Individually and as a Member, Representative and Secretary of Teamsters Local Union No. 898, Affiliated With the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and the American Federation of Labor, an Unincorporated Association,

Plaintiff,

vs.

VALLEY TRANSIT CEMENT COMPANY, INC., a Corporation; Black Company, 1-5, Inclusive, Copartnerships; White Company, 1-5, Inclusive, Corporations; Doe 1-50, Inclusive.

Defendants.

COMPLAINT FOR AN ACCOUNTING, FOR BREACH OF CONTRACT AND UNFAIR LABOR STANDARDS ACT

Comes Now Plaintiff and complains of the defendants and each of them, and for cause of action alleges:

First Cause of Action

I.

That jurisdiction is conferred upon this Court by Section 301(a), Labor Management Relations Act,

1947, a law of the United States regulating commerce.

II.

That prior to January 1, 1948, and at all times since, defendants have been engaged in the business of mixing, transportation and pouring of ready mixed concrete, sand and gravel: that during said time, such materials have been furnished and used by defendants for the maintenance, upkeep and repair of state highways, bridges and trestles, which were, have been and now are used regularly by vehicles [2*] moving in interstate commerce; that defendants have mixed, furnished, transported and supplied, during all of said time, sand, gravel and ready mixed concrete used in the construction, maintenance and repair of factories, canals, irrigation projects, and other instrumentalities of interstate commerce; that defendants, during said period, transported, furnished and used trucks and other equipment, and sold, delivered, furnished and used rock, sand and gravel in the State of Arizona, all of which equipment and material was transported to Arizona from the State of California.

By reason of the above, the activities of the defendants affect interstate commerce.

III.

That the defendant, Valley Transit Cement Company, Inc., is now and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of California,

*Page numbering appearing at foot of page of original Certified Transcript of Record.

with its principal office for the transaction of business in the County of Imperial, in said State. That the defendants, White Company, 1-5, inclusive, corporations, do each of them have a principal place of business in the County of Imperial, State of California. That the defendants, Doe 1-50, inclusive, are residents of the County of Imperial, State of California.

IV.

That the defendants Black Company, 1-5, inclusive, copartnerships, White Company, 1-5, inclusive, corporations, Doe 1-50, inclusive, are sued herein under fictitious names, their true names and capacities to plaintiff being unknown; that when such true names and capacities are ascertained, plaintiff will ask leave of Court to amend this complaint by inserting said true names and capacities herein. [3]

V.

That the Teamsters Local Union No. 898, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., is an unincorporated association functioning as a labor union.

VI.

That at all times mentioned herein, Beaumont Silverton has been and now is a member, representative and Secretary of said plaintiff union.

VII.

That prior to the commencement of this action the obligation herein sued upon was assigned to plain-

tiff by Thomas T. Johnson, and plaintiff is now the lawful holder thereof.

VIII.

That defendants hired plaintiff's assignor to render services for defendants, and agreed to pay to said person therefore the wages called for by the written collective bargaining agreement in existence between plaintiffs and defendants, and plaintiff's assignor accepted said offer of employment upon said terms and conditions, and did, upon the date set forth after his name in Exhibit "A" which is attached hereto and incorporated herein by reference with the same force and effect as if set forth herein and at length, enter into the performance of the duties as an employee of defendants, and has at all times mentioned herein been an employee of defendants.

IX.

That on or about November 1, 1948, plaintiff union and defendants entered into a written collective bargaining agreement covering wages, hours and conditions of employment for the employees of the defendants and each of them, which said written agreement was in full force and effect from November 1, 1948, to January 5, 1951. [4]

X.

That a true and correct copy of Article IV of said written agreement covering wages and classifications from November 1, 1948, to and inclusive of November 1, 1949, is attached hereto as Exhibit "B" and incorporated herein by reference with the same force and effect as if set forth herein at length.

XI.

That a true and correct copy of Article IV of said written agreement covering wages and classifications from November 1, 1949, to and inclusive of January 4, 1950, is attached hereto as Exhibit "C" and incorporated herein by reference with the same force and effect as if set forth herein at length.

XII.

That a true and correct copy of Article IV of said written agreement covering wages and classifications from January 5, 1950, to and inclusive of January 5, 1951, is attached hereto as Exhibit "D" and incorporated herein by reference with the same force and effect as if set forth herein at length.

XIII.

That at all times herein mentioned and from November 1, 1948, to January 5, 1951, inclusive, as aforesaid, the defendants and each of them have not been paying to plaintiff's assignor to work in excess of 8 hours per day or 40 hours per week, and have not paid said employee time and one-half for hours in excess of 8 hours in any one day or 40 hours in any one week, and have paid the employees less than the minimum straight time wage provided for in said agreements. [5]

XIV.

That during said period plaintiff's assignor has worked in various classifications set forth in said written collective bargaining agreement; that the exact classifications, period worked in such classifi-

cations and wages paid are unknown to plaintiff or to plaintiff's assignor, but defendants have in their possession time cards, records and data showing all of such information.

XV.

That plaintiff has no knowledge of the exact amounts paid, nor does plaintiff have knowledge of the exact number of overtime hours worked by said employee; but plaintiff is informed and believes and on such information and belief alleges that there is due to plaintiff's assignor the approximate sums set forth after his name in Exhibit "A." That defendants have in their possession and under their control a full and complete record of hours worked and wages paid to said employee, and that said records are under the exclusive control of defendants and each of them.

XVI.

That defendants have failed, neglected and refused, and do now fail, neglect and refuse to account to plaintiff or to plaintiff's assignor for the wages due plaintiff's assignor, although often requested by plaintiff so to do, and the defendants have refused and now refuse to pay to the plaintiff full wages as provided in said written agreement; that it is necessary that an accounting be had in order that the amounts payable and due the plaintiff from said defendants can be determined.

XVII.

That defendants and each of them wilfully failed

and refused to pay the wages provided for in said collective bargaining agreement.

For a Further, Second, Separate and Distinct Cause of Action, Plaintiff Alleges: [6]

I.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs I, II, III, IV, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI and XVII of the first cause of action, and incorporates them herein by reference as if set forth in full and at length.

II.

That prior to the commencement of this action the obligation herein sued upon was assigned to plaintiff by John Howard Glass, and plaintiff is now the lawful holder thereof.

For a Further, Third, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs I, II, III, IV, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XV of the first cause of action and incorporates them herein by reference as if set forth in full and at length.

II.

That prior to the commencement of this action the obligation herein sued upon was assigned to

plaintiff by H. B. Turner, and plaintiff is now the lawful holder thereof.

For a Fourth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs I, II, III, IV, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XV of the first cause of action and incorporates them herein by reference as if set forth in full and at length. [7]

I.

That prior to the commencement of this action the obligation herein sued upon was assigned to plaintiff by Truman Gregory, and plaintiff is now the lawful holder thereof.

For a Fifth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs I, II, III, IV, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XV of the first cause of action and incorporates them herein by reference as if set forth in full and at length.

II.

That prior to the commencement of this action the obligation herein sued upon was assigned to

plaintiff by James E. Butler, and plaintiff is now the lawful holder thereof.

For a Sixth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs I, II, III, IV, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XV of the first cause of action and incorporates them herein by reference as if set forth in full and at length.

II.

That prior to the commencement of this action the obligation herein sued upon was assigned to plaintiff by Ben Rose, and plaintiff is now the lawful holder thereof.

For a Seventh, Separate and Distinct Cause of Action, Plaintiff Alleges: [8]

I.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs I, II, III, IV, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XV of the first cause of action and incorporates them herein by reference as if set forth in full and at length.

II.

That prior to the commencement of this action the obligation herein sued upon was assigned to plaintiff by Lester Hogan, and plaintiff is now the lowful holder thereof.

For an Eighth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs I, II, III, IV, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XV of the first cause of action and incorporates them herein by reference as if set forth in full and at length.

II.

That prior to the commencement of this action the obligation herein sued upon was assigned to plaintiff by L. L. Chidester, and plaintiff is now the lawful holder thereof.

For a Ninth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs I, II, III, IV, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XV of the first cause of action and incorporates them herein by reference as if set forth in full and at length.

II.

That prior to the commencement of this action the obligation [9] herein sued upon was assigned to plaintiff by James M. Turner, and plaintiff is now the lawful holder thereof.

For a Tenth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs I, II, III, IV, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XV of the first cause of action and incorporates them herein by reference as if set forth in full and at length.

II.

That prior to the commencement of this action the obligation herein sued upon was assigned to plaintiff by Tom W. Garrett, and plaintiff is now the lawful holder thereof.

For an Eleventh, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs I, II, III, IV, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XV of the first cause of action and incorporates them herein by reference as if set forth in full and at length.

II.

That prior to the commencement of this action the obligation herein sued upon was assigned to plaintiff by Bert N. Loop, and plaintiff is now the lawful holder thereof.

For a Twelfth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs I, II, III, IV, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XV of the first cause of action and [10] incorporates them herein by reference as if set forth in full and at length.

II.

That prior to the commencement of this action the obligation herein sued upon was assigned to plaintiff by Charles M. Parker, and plaintiff is now the lawful holder thereof.

For a Thirteenth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs I, II, III, IV, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XV of the first cause of action and incorporates them herein by reference as if set forth in full and at length.

II.

That prior to the commencement of this action the obligation herein sued upon was assigned to plaintiff by James L. Johnson, and plaintiff is now the lawful holder thereof.

For a Fourteenth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats each and every allegation and statement contained in the First Cause of Action and incorporates them herein by reference.

II.

That jurisdiction of this cause of action is conferred upon the Court by the provisions of the Act of June 25, 1938, C. 676, Stats. 1069, 29 U.S.C. Secs. 201, 219, known as the Fair Labor Standards Act of 1938, a law of the United States regulating commerce.

III.

That prior to January 1, 1948, and at all times since, defendants [11] have been engaged in the business of mixing, transportation and pouring of ready mixed concrete, sand and gravel; that during said time, such materials have been furnished and used by defendants for the maintenance, upkeep and repair of state highways, bridges and trestles, which were, have been and now are used regularly by vehicles moving in interstate commerce; that defendants have mixed, furnished, transported and supplied, during all of said time, sand, gravel and ready mixed concrete used in the construction, maintenance and repair of factories, canals, irrigation projects, and other instrumentalities of interstate commerce; that defendants, during said period, transported, furnished and used trucks and other

equipment, and sold, delivered, furnished and used rock, sand and gravel in the State of Arizona, all of which equipment and material was transported to Arizona from the State of California.

By reason of the above, the activities of the defendants affect interstate commerce.

IV.

That during said period, plaintiff's assignor was an employee of defendants and as such was during the course of said employment engaged in interstate commerce, and as such did render during the course of said employment services for defendants, and each of them, in connection with the activities of defendants, said services consisting of driving trucks and other vehicles, lubricating, repairing, operating and maintaining trucks, mixing and other equipment, and mixing and pouring concrete.

V.

At and during such time, under the provisions of the said Fair Labor Standards Act of 1938, plaintiff's assignor was entitled to receive from defendants as his rate of pay for all overtime hours, or hours worked in excess of forty (40) hours per week, a rate of pay equivalent to one and one-half times the said straight time, regular rate of pay. Plaintiff has demanded an accounting of the [12] sums so due and payment thereof, but defendants have failed, refused and neglected to pay said wages, or any part thereof.

VI.

It has become necessary for plaintiff to engage, and this plaintiff has accordingly engaged, the services of attorneys to file and prosecute this action on plaintiff's behalf against defendants and each of them.

For a Fifteenth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in the Second Cause of Action, and incorporates them herein by reference.

II.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs II, III, IV, V and VI of the Fourteenth Cause of Action and incorporates them herein by reference.

For a Sixteenth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in the Third Cause of Action, and incorporates them herein by reference.

II.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs II, III, IV, V and VI of the Fourteenth Cause of Action and incorporates them herein by reference.

For a Seventeenth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in the Fourth Cause of Action, and incorporates [13] them herein by reference.

II.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs II, III, IV, V and VI of the Fourteenth Cause of Action, and incorporates them herein by reference.

For an Eighteenth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in the Fifth Cause of Action, and incorporates them herein by reference.

II.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs II, III, IV, V, and VI of the Fourteenth Cause of Action and incorporates them herein by reference.

For a Nineteenth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in the Sixth Cause

of Action, and incorporates them herein by reference.

II.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs II, III, IV, V and VI of the Fourteenth Cause of Action and incorporates them herein by reference.

For a Twentieth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in the Seventh Cause of Action, and incorporates them herein by reference. [14]

II.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs II, III, IV, V and VI of the Fourteenth Cause of Action and incorporates them herein by reference.

For a Twenty-first, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in the Eighth Cause of Action, and incorporates them herein by reference.

II.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs II,

III, IV, V and VI of the Fourteenth Cause of Action and incorporates them herein by reference.

For a Twenty-second, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in the Ninth Cause of Action, and incorporates them herein by reference.

II.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs II, III, IV, V and VI of the Fourteenth Cause of Action and incorporates them herein by reference.

For a Twenty-third, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in the Tenth Cause of Action, and incorporates them herein by reference.

II.

Plaintiff repeats and repleads each and every allegation and [15] statement contained in paragraphs II, III, IV, V and VI of the Fourteenth Cause of Action and incorporates them herein by reference.

For a Twenty-fourth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in the Eleventh Cause of Action, and incorporates them herein by reference.

II.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs II, III, IV, V and VI of the Fourteenth Cause of Action and incorporates them herein by reference.

For a Twenty-fifth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in the Twelfth Cause of Action, and incorporates them herein by reference.

II.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs II, III, IV, V and VI of the Fourteenth Cause of Action and incorporates them herein by reference.

For a Twenty-sixth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in the Thirteenth

Cause of Action, and incorporates them herein by reference.

II.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs II, III, IV, V and VI of the Fourteenth Cause of Action and incorporates them herein by reference. [16]

Wherefore, plaintiff prays judgment as follows:

1. For an accounting and the payment to plaintiff of all sums due.

2. That the sums due for hours worked in excess of 40 hours in any one week be trebled.

3. For damages due under the Fair Labor Standards Act.

4. For reasonable attorneys' fees.

5. For costs of suit herein incurred.

6. For such other and further relief as may be just and proper in the premises.

JOHN C. STEVENSON &
LIONEL RICHMAN,

By /s/ LIONEL RICHMAN,
Attorneys for Plaintiff. [17]

EXHIBIT A

Thomas T. Johnson—November 1, 1948	$5000.00
John Howard Glass—April 1, 1946	5000.00
H. B. Turner—November 1, 1948	5000.00
Truman Gregory—February 12, 1950	1000.00
James E. Butler—February 1, 1949	3000.00
Ben Rose—March 23, 1948	5000.00
Lester Hogan—August 23, 1948	5000.00
L. L. Chidester—December 1, 1949	2500.00
James M. Turner—November 1, 1948	5000.00
Tom W. Garrett—August 23, 1948	5000.00
Bert N. Loop—December 4, 1948	4850.00
Charles M. Parker—November 25,1948	4950.00
James L. Johnson—September 19, 1947	5000.00

EXHIBIT B

Article IV.

Section 1. The schedule of wages to be paid under this Agreement to the various classifications of employees is as follows:

Classification	Minimum Straight Time Wage Rates Effective Nov. 1, 1948
Drivers of Plant Trucks, 8 tons and under	$1.50
over 8 tons to 12 tons inc.	1.55
Drivers of 4 wheel trucks	1.50
6 wheel trucks	1.55
Drivers of semis under 14 tons	1.60

Drivers of truck-trailer & semis	1.65
Drivers of transit mix trucks:	
4 yds. and under	1.70
over 4 yds.	1.85
Drivers of flats: Under 5 tons	1.50
over 5 tons	1.60
Drivers of flats truck-trailers & semis	1.70
Gas station operators	1.45
Washers	1.50
Greasers	1.60
Tiremen	1.60
Warehousemen	1.45
Warehouse foreman	1.50
Mechanic	1.90
Mechanic helpers	1.75
Bunkerman & loaders	1.45
Batch plant operators (manual)	1.70

Section 2. In all classifications time and one-half the straight time shall be paid for all time classed as overtime at the rate paid in the period overtime occurred. [19]

Section 3. Eight (8) hours shall constitute the regular work day. Forty (40) hours, beginning on Monday, shall constitute the regular straight-time work-week except that:

(a) In weeks in which a holiday occurs or the employee is off a day because of an excused absence, or laid off because of lack of work, the straight-time work-week is 32 hours.

(b) In weeks in which a holiday occurs, or the employee is off two days because of an excused ab-

sence, or laid off because of lack of work then the work-week is 24 hours.

Overtime at one and one-half (1½) times the straight-time rate will be paid for hours worked over eight (8) per day or forty (40) straight-time hours per week, except that in work-weeks in which holidays or excused absences occur, then overtime shall be paid for hours over 32 or 24, as the case may be. If an employee works only Saturday and/or Sunday in any one work-week, he shall be paid for all such hours worked at the overtime rate.

Section 4. The following days shall be recognized as holidays:

> New Year's Day, Labor Day, Memorial Day, Armistice Day, Independence Day, Thanksgiving Day and Christmas Day.

When any of the above holidays fall on Sunday, then the day designated by the Governor of the State of California shall apply, in such cases, as the holiday.

Section 5: A minimum of four (4) hours pay shall be allowed whenever employees are ordered to report to work whether the job lasts less than four (4) hours or not. Where an employee works in excess of four (4) hours, he shall be allowed eight (8) hours pay, except on Saturdays. Such pay for hours not worked shall be at straight time except on a holiday when it shall be at time and a half. Overtime shall not be pyramided or duplicated. [20] An employee shall receive pay hereunder only for hours actually worked if he elects to leave the yard,

or refuses to do other work, or if the Employer is unable to furnish him work because of inclement weather, mechanical breakdown (other than of the employee's own truck), or other condition beyond his control.

Section 6. No driver shall work a split shift. No more than one-half (½) hour will be deducted for lunch unless the truck is in the dispatching yard, or unless the job to which the material is being delivered is working on an hourly lunch period basis; any more than one (1) hour shall be classified as a split shift. Lunch period will be between the fourth (4th) and sixth (6th) working hours.

Section 7. When more than one (1) shift is required on continuous pours requiring changing of shifts away from the yard, traveling time at the straight time rate, shall be paid drivers going to and coming from points of operation. Transportation to and from job to be furnished by employer.

Section 8. Whenever special setups are created on, or adjacent to, large projects for the purpose of batching or transit mix, etc., where an agreement with the contractors on said projects carries a higher rate than provided for herein, the higher wage scale prevailing on the project shall apply. [21]

EXHIBIT C

Article IV.

Section 1. The schedule of wages to be paid under this agreement to the various classifications of employee is as follows:

Classification	Minimum Straight Time Wage Rates Effective Nov. 1, 1949
Driver of plant trucks,	
8 tons and under	$1.50 per hour
over 8 tons to 12 tons	1.55 " "
Drivers of: 4 wheel trucks	1.50 " "
6 wheel trucks	1.55 " "
Drivers of semi under 14 tons	1.60 " "
Drivers of truck-trailer & semis	1.65 " "
Drivers of transit mix trucks	1.75 " "
Drivers of flats under 5 tons	1.50 " "
over 5 tons	1.60 " "
Truck trailer & semis	1.70 " "
Gas station operators:	
Washers	1.50 " "
Greaser	1.60 " "
Tiremen	1.60 " "
Warehousemen	1.45 " "
Warehouse foreman	1.50 " "
Mechanic	1.90 " "
Mechanic helper	1.75 " "
Bunkerman & loaders	1.45 " "
Batch plant operators (manual)	1.70 " "

Section 2. In all classifications time and one-half the straight time shall be paid for all time classed

as overtime at the rate paid in the period overtime occurred.

Section 3. Eight (8) hours shall constitute the regular work day. Forty (40) hours, beginning on Monday through Friday, shall constitute the regular straight time work-week except that: (a) In weeks in which a holiday occurs, or the employee is off a day because [22] of an excused absence, or laid off because of lack of work, the straight time work-week is 32 hours. (b) In weeks in which a holiday occurs, or the employee is off two days because of an excused absence, or laid off because of lack of work, the straight time work-week is 24 hours. Overtime at one and one-half times (1½) the straight time rate will be paid for hours worked over eight (8) per day or forty (40) straight time hours per week, except that in work-weeks in which holidays or excused absences occur, then overtime shall be paid for hours over 32 or 24, as the case may be. If an employee works only Saturday and/or Sunday in any one work-week, he shall be paid for all such hours worked at the overtime rate.

The Employer shall provide and maintain a time-clock for all employees covered by this agreement at their main plant. However, at Branch plants they must have an authorized or agreeable means of recording their time and shall require employees to register on it properly; said clock or card shall be accessible to the Union representative at all times. That only on actual Grievances shall the Union Representative have access to the Company books. How-

ever, he shall have the right to check time cards and payrolls and shall be furnished a true and certified copy of the Federal Government Payroll report.

Section 4. The following days shall be recognized as holidays:

> New Year's Day, Labor Day, Memorial Day, Armistice Day, Independence Day, Thanksgiving Day and Christmas Day.

When any of the above holidays fall on Sunday, then the day designated by the Governor of the State of California shall apply, in such cases, as the holiday.

Section 5. A minimum of four (4) hours pay shall be allowed whenever employees are ordered to report to work whether the job lasts less than four (4) hours or not. Where an employee works in excess of four (4) hours, he shall be allowed eight (8) hours pay, except on Saturdays. Such pay for hours not worked shall be at straight time [23] except on a holiday when it shall be at time and one-half. Overtime shall not be pyramided or duplicated.

An employee shall receive pay hereunder only for hours actually worked; if he elects to leave the yard, or refuses to do other work or if the Employer is unable to furnish him work because of inclement weather, mechanical breakdown (other than of employees own truck) or other condition beyond his control.

Section 6. No driver shall work a split shift. No more than one-half (½) hour will be deducted for lunch unless the truck is in the dispatching yard, or unless the job to which the material is being delivered is working on an hourly lunch period basis; any more than one (1) hour shall be classified as a split shift. Lunch period will be between the fourth and sixth working hours.

Section 7. When more than one (1) shift is required on continuous hours requiring changing of shifts away from the yard, traveling time at the straight time rate shall be paid drivers going to and coming from points of operation. Transportation to and from the job to be furnished by the Employer.

Section 8. Whenever special set-ups are created on, or adjacent to large projects for the purpose of batching or transit mix, etc., where agreement with the contractors on said projects carries a higher rate than provided herein, the higher wage scale prevailing on the project shall apply. [24]

EXHIBIT D

Article IV.

Section 1. The schedule of wages to be paid under this agreement to the various classifications of employee is as follows:

Classification	Minimum Straight Time Wage Rates Effective Nov. 1, 1949
Driver of plant trucks.	
8 tons and under	$1.50 per hour
over 8 tons to 12 tons	1.55 " "
Drivers of 4 wheel trucks	1.50 " "
6 wheels trucks	1.55 " "
Drivers of semis under 14 tons	1.60 " "
Drivers of truck-trailer & semis	1.65 " "
Drivers of transit mix trucks	1.75 " "
Drivers of flats under 5 tons	1.50 " "
over 5 tons	1.60 " "
Truck-trailer & semis	1.70 " "
Gas station operators:	
Washers	1.50 " "
Greaser	1.60 " "
Tiremen	1.60 " "
Warehousemen	1.45 " "
Warehouse foreman	1.50 " "
Mechanic	1.90 " "
Mechanic helper	1.75 " "
Bunkerman & loaders	1.45 " "
Batch plant operators (manual)	1.70 " "

Section 2. In all classifications time and one-half the straight time shall be paid for all time classed

as overtime at the rate paid in the period overtime occurred.

Section 3. Eight (8) hours shall constitute the regular work day. Forty (40) hours, beginning on Monday through Friday, shall constitute the regular straight time work-week except that: (a) In weeks in which a holiday occurs, or the employee is off a day because [25] of an excused absence, or laid off because of lack of work, the straight time work-week is 32 hours. (b) In weeks in which a holiday occurs, or the employee is off two days because of an excused absence, or laid off because of lack of work, the straight time work-week is 24 hours.

Overtime at one and one-half times (1½) the straight time rate will be paid for hours worked over eight (8) per day or forty (40) straight time hours per week, except that in work-weeks in which holidays or excused absences occur, then overtime shall be paid for hours over 32 or 24 as the case may be. If an employee works only Saturday and/or Sunday in any one work-week, he shall be paid for all such hours worked at the overtime rate.

The Employer shall provide and maintain a time clock for all employees covered by this agreement at their main plant. However, at Branch plants they must have an authorized or agreeable means of recording their time and shall require employees to register on it properly; said clock or card shall be accessible to the Union Representative at all times. That only on actual grievances shall the Union Rep-

resentative have access to the Company books. However, he shall have the right to check time cards and payrolls and shall be furnished a true and certified copy of the Federal Government Payroll report.

Section 4. The following days shall be recognized as holidays:

> New Year's Day, Labor Day, Memorial Day, Armistice Day, Independence Day, Thanksgiving Day and Christmas Day.

When any of the above holidays fall on Sunday, then the day designated by the Governor of the State of California shall apply, in such cases, as the holiday.

Section 5. A minimum of four (4) hours' pay shall be allowed whenever employees are ordered to report to work whether the job lasts less than four (4) hours or not. Where an employee works in [26] excess of four (4) hours, he shall be allowed eight (8) hours pay, except on Saturdays. Such pay for hours not worked shall be at straight time except on a holiday when it shall be at time and one-half. Overtime shall not be pyramided or duplicated.

An employee shall receive pay hereunder only for hours actually worked; if he elects to leave the yard, or refuses to do other work or if the Employer is unable to furnish him work because of inclement weather, mechanical breakdown (other than of employees own truck) or other condition beyond his control.

Section 6. No driver shall work a split shift. No more than one-half (½) hour will be deducted for lunch unless the truck is in the dispatching yard, or unless the job to which the material is being delivered is working on an hourly lunch period basis; any more than one (1) hour shall be classified as a split shift. Lunch period will be between the fourth and sixth working hours.

Section 7. When more than one (1) shift is required on continuous hours requiring changing of shifts away from the yard, traveling time at the straight time rate shall be paid drivers going to and coming from points of operation. Transportation to and from the job to be furnished by the Employer.

Section 8. Whenever special set-ups are created on, or adjacent to large projects for the purpose of batching or transit mix, etc., where agreement with the contractors on said projects carries a higher rate than provided herein, the higher wage scale prevailing on the project shall apply.

Duly verified.

[Endorsed]: Filed March 27, 1953. [27]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS ACTION

To the Plaintiff Above Named and to Stevenson & Richman, His Attorneys:

You and each of you will please take notice that defendant will move the above-entitled Court on

Monday, June 29th, 1953, at 2 o'clock p.m. in the courtroom of the above-entitled Court located in the Federal Building at San Diego, California, for its order dismissing your complaint.

Said motion will be made upon the ground that the Court lacks jurisdiction over the subject matter of the action for the reason that there is another action pending between the parties in the Superior Court of the State of California in and for the County of Imperial, being Civil No. 26771, which said action involves exactly the same subject matter as the action before this Court. [29]

Said motion will be based upon all of the pleadings and records in this case.

Attached hereto is a memorandum of authorities in support of said motion.

Dated June 24, 1953.

/s/ HORTON & KNOX,
Attorneys for Defendant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 25, 1953. [30]

United States District Court for the Southern District of California, Southern Division

No. 1485-SD

BEAUMONT SILVERTON, etc.,

Plaintiff,

vs.

VALLEY TRANSIT CEMENT CO., INC., et al.,

Defendants.

JUDGMENT OF DISMISSAL

This cause came on to be heard on defendant's motion to dismiss and upon plaintiff's motion to amend his complaint, and the Court having received a stipulation by the parties hereto to submit the respective motions of the defendants and plaintiff upon the record and without oral argument, and the Court thereafter denied plaintiff's motion and granted defendant's motion to dismiss,

It Is Hereby Ordered, Adjudged and Decreed that plaintiff's motion to amend is hereby denied, and that defendants' motion to dismiss the action is hereby granted for lack of jurisdiction over the subject matter of the first thirteen causes of action, and for failure to join an indispensable party to the fourteenth through the twenty-sixth causes of action, and that the action be dismissed accordingly. [32]

It Is Further Ordered that the judgment of dismissal shall not constitute an adjudication upon the merits.

Dated this 17th day of December, 1955.

/s/ WM. C. MATHES,
United States District Judge.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed December 19, 1955.

Docketed and Entered December 19, 1955. [33]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Honorable United States District Court for the Southern District of California, Southern Division:

The plaintiff hereby appeals from that Judgment of Dismissal docketed and entered December 19, 1955, and appeals to the Court of Appeals, 9th Circuit.

Dated: This 17th day of January, 1956.

JOHN C. STEVENSON and
LIONEL RICHMAN,

By /s/ LIONEL RICHMAN,
Attorneys for Plaintiff.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed January 25, 1956. [38]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 39, inclusive, contain the original

Complaint;
Notice of Motion & Motion to Dismiss Action;
Judgment of Dismissal;
Designation of Record on Appeal;
Notice of Appeal;

and a full, true and correct copy of Notification of Entry of Judgment of Dismissal, all in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals of the Ninth Circuit, in the above case.

I further certify that my fees for preparing the record on appeal amount to $2.00, which sum has been paid by appellant.

Witness my hand and the seal of the said Court this 5th day of March, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15055. United States Court of Appeals for the Ninth Circuit. Beaumont Silverton, Individually and as a Member Representative and Secretary of Teamster Local Union No. 898, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and the American Federation of Labor, Appellant, vs. Valley Transit Cement Company, Inc., a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed March 6, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Judicial Circuit
No. 15055

BEAUMONT SILVERTON, etc.,

Plaintiff and Appellant,

vs.

VALLEY TRANSIT CEMENT CO., INC., et al.,

Defendants and Respondents.

APPELLANT'S STATEMENT OF POINTS AND DESIGNATION OF RECORD PURSUANT TO RULE 17(6)

The sole point upon which Appellant intends to rely is that the Court below erred in dismissing the first thirteen causes of action for lack of jurisdiction, and will contend that the United States District Court had, and still has, jurisdiction over the causes of action represented by the first through the thirteen causes of action.

Appellant will rely upon the Complaint and the Motion to Dismiss as that part of the record in the above-cause pertinent to the appeal.

Dated: This 14th day of March, 1956.

JOHN C. STEVENSON and
LIONEL RICHMAN,

By /s/ LIONEL RICHMAN,
Attorneys for Plaintiff and
Appellant.

Affidavit of Service by Mail Attached.
[Endorsed]: Filed March 16, 1956.

No. 15055

United States Court of Appeals

for the Ninth Circuit

BEAUMONT SILVERTON, etc.,

Appellant,

vs.

VALLEY TRANSIT CEMENT CO., INC., et al.,

Appellees.

Supplemental

Transcript of Record

Appeal from the United States District Court for the Southern District of California Southern Division.

FILED

APR 24 1957

PAUL P. O'BRIEN, CLE

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-19-57

No. 15055

United States
Court of Appeals
for the Ninth Circuit

BEAUMONT SILVERTON, etc.,

Appellant,

vs.

VALLEY TRANSIT CEMENT CO., INC., et al.,

Appellees.

Supplemental
Transcript of Record

Appeal from the United States District Court for the Southern District of California Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-19-57

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

JOHN C. STEVENSON,
LIONEL RICHMAN,
756 South Broadway,
Los Angeles 14, California.

For Appellee:

HORTON & KNOX,
JAMES H. CARTER,
101 Law Building,
895 Broadway, El Centro, California.

In the District Court of the United States in and for the Southern District of California, Southern Division

No. Civil 1485-SD

BEAUMONT SILVERTON, etc.,

Plaintiff,

vs.

VALLEY TRANSIT CEMENT CO., INC., et al.,

Defendants.

NOTICE OF MOTION TO DISMISS

To the Plaintiff Above Named, Beaumont Silverton, and to Stevenson & Richman, His Attorneys:

You and each of you will please take notice that Defendants Valley Transit Cement Co., Inc., a Corporation; George Conway and Robert L. Wyatt, individually and doing business under the fictitious firm name of Valley Transit Cement Company, a Co-partnership, will move the above-entitled Court, on Monday, November 7, 1955, at ten o'clock a.m., or as soon thereafter as Counsel may be heard, at the United States Court and Customs House, in the City of San Diego, California, for its order to dismiss the complaint, or in the alternative to dismiss each and every cause of action, severally, the first cause of action, and each cause of action thereafter, to and including the twenty-sixth cause of action of said complaint.

This motion to dismiss the complaint and in the alternative, the first cause of action through the twenty-sixth cause of action, inclusive, severally, of said complaint, will be made on the following grounds:

1. That the Court lacks jurisdiction over the subject matter of said complaint, and in the alternative, the Court lacks jurisdiction over the subject matter of each cause of action of said complaint, severally, from the first cause of action through the twenty-sixth cause of action, inclusive;

2. That the complaint fails to state a claim upon which relief can be granted, and in the alternative, that each of the causes of action from the first cause of action to the twenty-sixth cause of action, inclusive, fails to state a claim upon which relief can be granted;

3. That the causes of action from the first cause of action to the twenty-sixth cause of action, inclusive, are barred by the provisions of the Statute of Limitations of the State of California, Labor Management Relations Act of 1947, and acts amendatory thereto, and the Fair Labor Standards Act of 1938 and acts amendatory thereto.

This motion will be made and based upon Memorandum of Points and Authorities, this Motion and upon all papers, records and pleadings on file in this matter.

Dated this 28th day of October, 1955.

HORTON & KNOX,

By /s/ JAMES H. CARTER,
Attorneys for Defendants Valley Transit Cement Company, Inc., George L. Conway and Robert L. Wyatt, Individually and Doing Business Under the Fictitious Firm Name of Valley Transit Cement Company, a Co-Partnership.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 31, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF LIONEL RICHMAN IN SUPPORT OF MOTION TO AMEND COMPLAINT

State of California,
County of Los Angeles—ss.

Lionel Richman, being first duly sworn, deposes and says:

That affiant is an attorney at law licensed to practice in the State of California. That prior to the commencement of this action, the real parties in interest whose names appear in the Complaint as assignors executed and delivered to affiant a written consent and authorization to commence this suit on their behalf. Such written authorization is attached

hereto as Exhibit 2 and incorporated herein by reference.

/s/ LIONEL RICHMAN.

Subscribed and sworn to before me this 15th day of November, 1955.

[Seal] /s/ LEWIS GARRETT,
Notary Public in and for Said County of Los Angeles, State of California.

EXHIBIT No. 2

I hereby assign my claim against the said Valley Transit Cement Company, Inc., to Beau Silverton, for purposes of collection only.

Dated this 8th day of September, 1951.

/s/ JAMES M. TURNER.

I hereby assign my claim against the said Valley Transit Cement Company, Inc., to Beau Silverton, for purposes of collection only.

Dated this 26th day of April, 1951.

/s/ BERT N. LOOP.

I hereby assign my claim against the said Valley Transit Cement Company, Inc., to Beau Silverton, for purposes of collection only.

Dated this 27th day of April, 1951.

I, James E. Butler, hereby retain John C. Stevenson and Lionel Richman attorneys to handle my wage claim against the Valley Transit Cement Company, Inc.

I hereby assign my claim against the said Valley Transit Cement Company, Inc., to Beau Silverton, for purposes of collection only.

Dated this 25th day of April, 1951.

/s/ TRUMAN GREGORY.

I hereby assign my claim against the said Valley Transit Cement Company, Inc., to Beau Silverton, for purposes of collection only.

Dated this 26th day of April, 1951.

/s/ BEN ROSE.

I hereby assign my claim against the said Valley Transit Cement Company, Inc., to Beau Silverton, for purposes of collection only.

Dated this 25th day of April, 1951.

/s/ JAMES M. TURNER.

I hereby assign my claim against the said Valley Transit Cement Company, Inc., to Beau Silverton, for purposes of collection only.

Dated this 25th day of April, 1951.

/s/ H. B. TURNER.

I hereby assign my claim against the said Valley Transit Cement Company, Inc., to Beau Silverton, for purposes of collection only.

Dated this 27th day of April, 1951.

/s/ JOHN HOWARD GLASS.

I hereby assign my claim against the said Valley Transit Cement Company, Inc., to Beau Silverton, for purposes of collection only.

Dated this 21st day of April, 1951.

/s/ LESTER HOGAN.

I hereby assign my claim against the said Valley Transit Cement Company, Inc., to Beau Silverton, for purposes of collection only.

Dated this 25th day of April, 1951.

/s/ L. CHICHESTER.

I hereby assign my claim against the said Valley Transit Cement Company, Inc., to Beau Silverton, for purposes of collection only.

Dated this 24th day of April, 1951.

/s/ JAMES L. JOHNSON.

I hereby assign my claim against the said Valley Transit Cement Company, Inc., to Beau Silverton, for purposes of collection only.

Dated this 25th day of April, 1951.

I, Tom Ward Garrett, hereby retain John C. Stevenson and Lionel Richman attorneys to handle my wage claim against the Valley Transit Company, Inc.

I hereby assign my claim against the said Valley Transit Cement Company, Inc., to Beau Silverton, for purposes of collection only.

Dated this 27th day of April, 1951.

/s/ CHARLES M. PARKER.

[Endorsed]: Filed November 16, 1955.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, here certify that the items listed below constitute the Supplemental Transcript of Record on Appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages numbered 1 to 10, inclusive, containing the original

Notice of Motion to Dismiss;

Affidavit of Lionel Richman in Support of Motion to Amend Complaint;

Designation of Supplemental Record on Appeal.

Witness my hand and seal of the said District Court this 21st day of February, 1957.

[Seal] JOHN A. CHILDRESS,
Clerk;

/s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15055. United States Court of Appeals for the Ninth Circuit. Beaumont Silverton, etc., Appellant, vs. Valley Transit Cement Co., Inc., et al., Appellees. Supplemental Transcript of Record. Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed February 25, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 15055.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEAUMONT SILVERTON, individually and as a member, representative and Secretary of Teamsters Local Union No. 898, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and the American Federation of Labor,

Appellant,

vs.

VALLEY TRANSIT CEMENT COMPANY, INC., a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

FILED

JUN - 2 1956

PAUL P. O'BRIEN, CLERK

LIONEL RICHMAN, ESQ.,
756 South Broadway,
Los Angeles 14, California,
Attorney for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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No. 15055.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEAUMONT SILVERTON, individually and as a member, representative and Secretary of Teamsters Local Union No. 898, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and the American Federation of Labor,

Appellant,

vs.

VALLEY TRANSIT CEMENT COMPANY, INC., a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Fact.

Appellant's complaint consisted of 26 causes of action. Only the first 13 are considered by this appeal. Each of the first 13 causes of action stated substantially the following facts:

Appellant, Beaumont Silverton, was an officer and member of Teamsters Local Union No. 898, an unincorporated association, and brought the action in a representative capacity on behalf of Local 898.

Appellee, Valley Transit Cement Company, Inc., was a corporation whose activities affected interstate commerce.

Sometime prior to the commencement of the action, Local 898 and Valley had been parties to a series of collective bargaining agreements fixing minimum wages, hours and conditions of employment. These agreements were made by Local 898 on its own behalf, and for the benefit of the employees of Valley.

Notwithstanding said agreements, Valley failed and neglected to pay said employees the minimum wage or the overtime rates provided in the collective bargaining agreements. Prior to the commencement of the action, the claims of 13 individual employees were assigned to Local 898.

Legal Proceedings Below.

Local 898 commenced an action in the United States District Court for an accounting and damages, invoking the jurisdiction of the court under Section 301(a) of the Labor Management Relations Act of 1947.

Acting in reliance upon the decision of the United States Supreme Court in the case of *Association of Westinghouse Salaried Employees v. Westinghouse Corporation,* 348 U. S. 437, the court below, on its own motion, dismissed the action for lack of jurisdiction.

It is from the judgment of dismissal of the first 13 causes of action that Local 898 prosecutes this appeal.

Point of Law.

Does the United States District Court have jurisdiction to hear and determine an action by a Union for damages for breach of a collective bargaining agreement under Section 301(a) of the Labor Management Relations Act of 1947, absent diversity of citizenship?

ARGUMENT.

I.

Jurisdiction Is Granted Pursuant to Article III of the Constitution of the United States.

Jurisdiction in a Section 301 case is not based upon diversity of citizenship but upon the provision in Article III of the Constitution of the United States that extends the judicial power of the United States to cases "arising under . . . the laws of the United States."

The plain language of the statute shows an intent to remove the limitations of amount in controversy and diversity of citizenship as conditions for exercise of federal jurisdiction. Indeed, it was the understanding of both the proponents and opponents of the Act that such would be the effect of Section 301(a).

An examination of *Legislative History of the Labor Management Relation Act of 1947* shows clearly that Congress intended jurisdiction to lie with the federal courts to enforce collective bargaining agreements affecting commerce.

In the report submitted by Mr. Fred Hartley, co-sponsor of the Act, to accompany H. R. 3020, the House of Representatives' version of the Labor Management Relations Act, the purpose of Section 301 was explained:

> "In brief outline, the bill accomplishes the following:
>
> * * * * * * * *
>
> "(18) It makes labor organizations equally responsible with employers for contract violations and provides for suit by either against the other in the United States district courts." (P. 297.)

This intent to broaden the federal court's jurisdiction was emphasized in House Report No. 245 on H. R. 3020 which pointed out that an action might be brought in any district court of the United States ". . . if the agreement affects commerce, or the court otherwise has jurisdiction of the cause." (Pp. 336-337.)

The opponents of the Act, in resisting its passage in the House claimed that the federal courts would be overburdened by extensive litigation due to the broadening of federal jurisdiction. In Minority Report No. 245 on H. R. 3020, the minority warned that,

> ". . . the bill would apparently give the Federal Courts jurisdiction of disputes over union agreements affecting commerce regardless of diversity of citizenship of the parties." (P. 400.)

Senator Taft, in an extensive discussion of the scope of Section 301, demonstrated the purpose of Section 301 to grant a uniform forum for the trial of suits arising out of the breach of collective bargaining agreements affecting interstate commerce.

In Senate Minority Report No. 105, Pt. 2 on S. 1126, it was said:

> "The Federal Courts have always had jurisdiction to entertain suits for breach of collective—bargaining contracts and have awarded money damages where the amount in controversy fulfills the present $3,000 requirement and diversity of cititzenship exists. *Nederlandsche Amerikaanische Stoomvart Maatschappij v. Stevedores and Longshoremen's Benevolent Society* (1920, 265 Fed. 397). It is

apparent from the language of Section 301 that no change is made in the application of State law for this purpose. The section states that—

" 'suits for violation of contracts concluded * * * in an industry affecting commerce * * * may be brought in any district court of the United States * * *.'

"Every district court would still be required to look to State substantive law to determine the question of violation. This section does not, therefore, create a new cause of action but merely makes the existing remedy available to more persons by removing the requirements of amount in controversy and of diversity of citizenship where interstate commerce is affected." (P. 475.)

II.

Such a Grant of Jurisdiction by Congress Does Not Violate the Constitution.

The Labor Management Relations Act is a comprehensive plan by Congress to protect the free flow of goods in interstate commerce from disruption due to labor unrest. With the power to legislate goes the power to enforce such legislation, and any exercise of the power to enforce is protected by Article III as a law arising under the laws of the United States. Such has been the holding of the courts.

"Defendants say that Section 301(a) creates no new substantive right or liability, and therefore this action is not one arising under the Constitution or laws of the United States. On this premise they contend the section is void as an attempt by Congress to extend jurisdiction of Federal courts beyond Con-

stitutional limits. Article III, Section 2, of the Constitution. This contention has been denied by every court which has considered it."

United Electrical etc. v. Oliver Corp., 205 F. 2d 376;

Schatte v. Int. Alliance, 182 F. 2d 158, 164, 165, cert. den. 340 U. S. 827.

III.

Reliance Upon the Law of the Several States in Enforcing Contracts Is Not a Bar to Federal Jurisdiction.

Since the overruling of *Swift v. Tyson,* the federal courts have been bound to consider the law of the place in determining the enforceability of contracts.

Thus, in determining the effect of a closed shop contract to save an employer from charges of unfair labor practises under Sections 8(1) and 8(3) of the Act, the Supreme Court looked to the law of California to determine the validity of the contract.

Colgate-Palmolive-Peet Co. v. N. L. R. B., 338 U. S. 355, 361, 94 L. Ed. 161, 168.

The law of Pennsylvania was applied in a Section 301 action to determine whether certain issues should be arbitrated prior to judicial action.

Insurance Agents' Int. Union v. Prudential Ins. Co., 122 Fed. Supp. 869.

Construction of a contract in a Section 301 action required reference to the laws of Rhode Island.

Industrial Trades Union v. Woonsocket Dyeing Co., 122 Fed. Supp. 872.

Enforcement of contributions to a Health & Welfare program are limited by the California law requiring individual authorizations for deductions from wages.

Int. Woodworkers v. McCloud River Lumber Co., 119 Fed. Supp. 475, 485.

To avoid belaboring the point further, it is submitted that the Labor-Management Relations Act is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers. The Act does not regulate the substantive terms governing wages, hours and working conditions which are incorporated in the agreement.

This attention to the *lex loci* would exist even if diversity of citizenship were involved, and therefore cannot be a serious handicap to the broad enforcement of Section 301.

> "We deal here with a right to recover that owes its existence to one of the States, not to the United States. The federal court enforces the state—created right by rules of procedure which it has acquired from the Federal Government and which therefore are not identical with those of the state courts."
>
> *Bernhardt v. Polygraph Co.,* 100 L. Ed. (Adv.) pp. 203, 207.

However, despite the difference of procedure, a federal court enforcing a state-created right is only another court of the State. The effect of Section 301 is merely to provide a federal forum for enforcement of contracts affecting commerce pursuant to the laws of the states.

Under those circumstances, the Federal Court looks to the law of the State.

> *Guaranty Trust Co. v. York,* 326 U. S. 99, 108-111, 89 L. Ed. 2079, 2086, 2087;
>
> *Erie R. Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188.

Section 301 does not purport to give the federal courts any different or additional power than a state court would have, it only provides a uniform forum to enforce a uniform right.

> *Mercury Oil Ref. Co. v. Oil Workers Int. Union,* 187 F. 2d 980.

IV.

Broad Interpretation of Section 301 Is Part of the Comprehensive Plan of Enforcement.

The national interest under the Act is the broad aim to prevent industrial strife leading to interruption of the production and flow of goods in interstate commerce.

For this reason, the Act not only imposes the duty to negotiate, but provides the machinery for enforcement of the contract which is the end result of those negotiations. A strike to enforce a contract is as disruptive of interstate commerce as a strike demanding the contract.

> "Enforcement of the obligation to bargain collectively is crucial to the statutory scheme."
>
> *N. L. R. B. v. American Nat. Ins. Co.,* 343 U. S. 395, 402, 96 L. Ed. 1027, 1036.

This aim of federal statutes requiring negotiations of contracts between unions and employers is well established. State statutes and decisions determine the interpretation

of the contract, since, generally, the specific provisions of the contract are of no moment to the national interest. However, the enforcement of such agreement is of paramount importance since,

> "The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce."
>
> *Terminal R. Asso. v. Brotherhood of R. Trainmen,* 318 U. S. 1, 6, 87 L. Ed. 571, 577.

Prior to the 1947 amendments to the National Labor Relations Act, defective enforcement was a glaring flaw. The National Labor Relations Board had the power to require unions and employers to deal fairly with each other, and to call upon the process of the federal court to enforce its orders. However, once this enforced fair dealing burgeoned into a collective bargaining agreement, the power of the Board ended.

Thereafter, if either party were of a mind to violate the agreement, enforcement was almost unavailable, due to multitudinous procedural pitfalls encountered in the courts of the states.

For the union, the only remedy was to strike to enforce the breached contract. This would cause the very disruption of commerce the Act was designed to prevent.

By the passage of Section 301 of the 1947 Act, Congress closed that breach by allowing the federal courts to carry out the intent of Congress and the purposes of the Act by preventing industrial warfare in all phases of dealings between unions and employers.

This uniform enforcement gives full effect to the integrated statutory scheme.

V.

The Westinghouse Decision Is Inapplicable to This Case.

The Motion to Dismiss was predicated upon the decision of the United States Supreme Court in the case of *Association of Westinghouse Salaried Employees v. Westinghouse Corporation,* 348 U. S. 437, decided in 1954. In considering the application of that decision to the instant case, it is necessary to examine the pleadings in both cases.

The *Westinghouse* case was a purported class action brought by the union on behalf of certain individuals who were not parties to the proceeding seeking to obtain an accounting and payment to the employees of monies allegedly due.

In the instant case, there has been an assignment by the employees to the union of their claims against the company for monies due the employees because of the breach by the company of the collective bargaining agreement which was part of the contract of hire. The action in the instant case is by the union on its own behalf for damages for breach of the collective bargaining agreement. Under Section 301 of the Labor Management Relations Act, the union has the right to sue for breach of the collective bargaining agreement. The assignment added to the element of damages and no more.

Thus, factually, there is this very basic difference between the two cases. In the *Westinghouse* case, the action was brought by the union seeking to enforce rights which lay wholly with the employees. In the instant case, we have an action by the union for breach of the collective bargaining agreement and seeking the damages for the

breach of that agreement which have been assigned to the union by the employees to whom the damages would otherwise be due.

An examination of the decision in the *Westinghouse* case will show that in the opinion of the numerical majority of the court, the instant complaint states a cause for relief and vests jurisdiction in the United States District Court.

The majority opinion written by Justice Frankfurter in which Justices Burton and Minton joined, holds that Section 301 was a little more than a clarification of public policy or procedure.

However, Chief Justice Warren and Justice Clark concurred in the judgment, but in a separate opinion held that the contract of hire was personal to the employee and since the employee was not a party to the action, the union had no standing to prosecute the claim.

Justice Reed, in a separate concurring opinion, also held that the action was properly one for breach of contract of hire, and that since the union had no interest in that contract, it could not bring the action.

Justices Douglas and Black dissenting, agreed with Justice Reed that this action was one for breach of contract of hire, but maintained that the union had a right to bring the action just as the union had the right to process grievances for employees.

So, in the instant case, where the damages under the contract of hire have been assigned to the union which brings its action for breach of the collective bargaining agreement, it would appear that Justices Clark, Reed, Douglas, Black and Chief Justice Warren would hold

that the action was properly brought, and Justices Frankfurter, Burton and Minton would be in the minority.

The collective bargaining agreement obligates the employer to include in the contracts of hire with each employee the terms and conditions which had been settled between the union and the employer.

> "Collective bargaining between employer and the representative of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone.
>
> * * * * * * * *
>
> "After the collective trade agreement is made, the individuals who shall benefit by it are identified by individual hirings. The employer, except as restricted by the collective agreement itself and except that he must engage in no unfair labor practice or discrimination, is free to select those he will employ or discharge. But the terms of the employment already have been traded out."
>
> *J. I. Case Co. v. N. L. R. B.,* 321 U. S. 332, 334-335.

The effect of the *Westinghouse* decision, reflected in all the opinions of the majority justices, was to eliminate from Section 301 jurisdiction a complaint by a union that involves no more than a cause of action which is "peculiar in the individual benefit" or "the uniquely personal right of an employee" or which "arises from

the individual contract between the employer and the employee." 348 U. S. at 460, 461, 464.

> "That holding was not aimed at any cause of action or remedy that appropriately pertains to the union as an entity, particularly one which an individual employee may have no equal power to enforce."
>
> *United Electrical Workers v. General Electric* (Apr. 25, 1956), ... F. 2d .....

Thus, it has been held that the breach of the collective bargaining agreement by the employer is actionable in a suit brought by the union.

(Modification of a pension plan contained in a collective bargaining agreement.)

A. F. of L. v. Western Union, 179 F. 2d 535.

(Breach of wage provisions.)

Local 937 Int. Union etc. v. Royal Typewriter Co., 88 Fed. Supp. 669.

(Discharge of employee.)

United Protective Workers v. Ford Motor Co., 194 F. 2d 997.

For actions upholding the jurisdiction of the federal courts to entertain damage actions for breach of contract by unions against employers absent diversity of citizenship, see:

(Wrongful termination of collective bargaining agreement.)

United Steel Workers v. Shakespeare Co., 84 Fed. Supp. 267.

(Refusal to carry out terms of oral agreement.)

United Shoe Workers v. LeDanne Footwear, Inc., 83 Fed. Supp. 714.

(Action for damages for loss of dues and initiation fees caused by failure of employer to enforce union shop provisions of contract.)

Silverton v. Rich, 119 Fed. Supp. 434;

Modine Mfg. Co. v. Grand Lodge IAM, 216 F. 2d 326.

(Refusal to abide by arbitration award.)

Milk & Cream Drivers etc. Union v. Gillespie, 203 F. 2d 650.

In deciding the *Westinghouse* case, the majority of the justices merely followed the Federal Rules of Civil Procedure which provide that every action shall be prosecuted by the real party in interest.

Rule 17, Federal Rules of Civil Procedure.

In interpreting the rules where the question of the capacity of a union to sue on behalf of its members has been raised, the courts have made the very same differentiation which appellant requests this Honorable Court to make. Thus, where a union sues to recover wages due its members, the court has held in accordance with the *Westinghouse* decision that the union was not the real party in interest not being a party to the contract of hire.

Joint Council of Dining Car Employees v. New York Central Railway, 9 Fed. Rules Serv. 17 b. 31, Case No. 1.

On the other hand, again applying Rule 17, the court has held that an association may sue as assignee of its members individual claims even though it would not have had capacity to sue in its own right.

National Hairdressers' Association v. Pilad Co., 7 Fed. Rules Serv. 17 a. 151, Case 1.

VI.

Under California Law, the Complaint Stated Facts Warranting Relief.

Even in the absence of the allegation of the assignments, Local 898 had stated a cause of action warranting relief, without any proof of actual damages.

> "When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages."
>
> Cal. Civ. Code, Sec. 3360.

In an action for breach of contract, nominal damages are presumed to follow as a conclusion of law from proof of the breach without evidence of the amount of damages.

Robinson v. Raquet, 1 Cal. App. 2d 533;

Bromberg v. Signal Gasoline Corp., 130 Cal. App. 469.

By the assignments, the appellant did no more than increase its measure of ascertainable damages.

This procedure is warranted by California law since a cause of action arising out of a contract is assignable.

Civ. Code, Sec. 954;

Meserve v. Superior Court, 2 Cal. App. 2d 468.

Money due for services rendered has such an interest that it may be assigned.

Taylor v. Black Diamond Coal Mine Co., 86 Cal. 589.

A claim may be assigned for the purpose of collection, and the assignee has a sufficient interest in the claim to maintain an action in his own name.

Teater v. Good Hope Development Corporation, 55 Cal. App. 2d 459.

Under the California Labor Code, any collective bargaining agreement is enforceable at law or in equity, and a breach is subject to the same remedies as are available on other contracts.

Cal. Labor Code, Sec. 1126.

A collective bargaining agreement is a third party beneficiary contract (*Sublett v. Henry's etc. Lunch,* 21 Cal. 2d 273) and the union, as the contracting party, may sue for its breach. (*Shell v. Schmidt,* 126 Cal. App. 2d 279.)

While the collective bargaining agreement and the contract of hire are two separate agreements, one enters into and becomes a part of the other by operation of law.

Levy v. Superior Court, 15 Cal. 2d 692.

And, a breach of the contract of hire also constitutes a breach of the collective bargaining agreement and may be the basis for an action by the union.

Silva v. Mercier, 33 Cal. 2d 704.

Conclusion.

Appellant submits, therefore, that this is precisely the type of action considered by Congress in enacting Section 301, and in furtherance of the comprehensive plan to protect interstate commerce, intended jurisdiction to be exercised by the federal courts.

In dismissing the first 13 causes of action, the court below undid the work of Congress, and returned the enforcement of collective bargaining agreements to the historical chaos of industrial warfare.

Respectfully submitted,

LIONEL RICHMAN,

Attorney for Appellant.

No. 15055

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEAUMONT SILVERTON, individually and as a member, representative and Secretary of Teamsters Local Union No. 898, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and the American Federation of Labor,

Appellant,

vs.

VALLEY TRANSIT CEMENT COMPANY, INC., a Corporation,

Appellee.

APPELLEE'S BRIEF.

HORTON & KNOX, and
JAMES H. CARTER,
101 Law Building,
895 Broadway,
El Centro, California,
Attorneys for Appellee.

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Appellant,

vs.

VALLEY TRANSIT CEMENT COMPANY, INC., a Corporation,

Appellee.

APPELLEE'S BRIEF.

Nature and Theory of Appellant's Appeal.

Appellant herein prosecutes this appeal only as to the first thirteen causes of action against Appellee, Valley Transit Cement Company, Inc., a Corporation.

Appellant, Beaumont Silverton, commenced this action, *individually,* and purportedly, as a *member, Representative,* and *Secretary* of Teamsters Local Union No. 898 [Tr. of Rec. p. 3].

Appellant alleges in first thirteen causes of action of said complaint that (1) Appellee was a California Corporation; (2) that on or about November 1, 1948, Appellee and Local 898 entered into a "written collective bargain-

ing agreement covering wages, hours and conditions of employment for the employees of defendants—"; (3) that said collective agreement was in effect from November 1, 1948, to January 5, 1951; (4) that Appellee failed to pay its employees the minimum wage or overtime wage as provided in said collective agreement; (5) that prior to filing complaint, the wage claims of thirteen individual employees were assigned to *Beau Silverton* [Supp. Tr. of Rec. pp. 46 to 49, incl.].

Appellant makes an allegation concerning Local 898 in paragraph V of first cause of action of complaint, *only,* and *does not* incorporate said paragraph V in the second through thirteenth causes of action.

Appellant Beaumont Silverton commenced this action in the District Court of the United States in and for the Southern District of California, Southern Division, alleging twenty-six causes of action, the first thirteen causes of action under the Labor Management Relations Act of 1947 and the last thirteen causes of action under Labor Management Relations Act of 1947 and the Fair Labor Standards Act; each cause of action representing a wage claim of a prior employee of Appellee, as assigned to Beau Silverton. No diversity of citizenship is claimed or alleged in said complaint.

Thereafter, and after the decision of the Supreme Court case of *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation,* 348 U. S. 437, 75 S. Ct. 488, 99 L. Ed. 510 (this case hereinafter referred to as *Westinghouse* case), Appellee filed a motion to dismiss [Supp. Tr. of Rec. p. 43]. Lower Court granted Appellee's motion for judgment of dismissal [Tr. of Rec. p. 36]. Opinion of lower court reported at 140 Fed. Supp. 709.

As concerns the first thirteen causes of action, Appellant alleges jurisdiction of the Court by Section 301 of the Labor Management Relations Act of 1947, 29 U. S. C. A. 185. The Court below in its opinion, at 140 Fed. Supp. 709 at page 710, said that Section 301 "does not confer upon this Court jurisdiction of the claims for unpaid wages asserted by the Union as assignee in the first thirteen causes of action, . . ." (citing the *Westinghouse* case), and the ". . . Court has no jurisdiction of such claims in the absence of diversity of citizenship, . . ." It is from this part of the judgment of dismissal that Appellant appeals.

Comments on Appellant's "Statement of Fact."

It is obvious that Appellant's version of the factual situation is focalized on the position that the Local Union 898 is a party to the action, as assignee of the thirteen wage claims involved. (Appellant's Op. Br. p. 2.) However, by reference to paragraph VII of plaintiff's first cause of action [Tr. of Rec. p. 5], and paragraph II of each cause of action from second through thirteenth, and by reference to Exhibit 2 [Supp. Tr. of Rec. pp. 46-49, incl.], the assignments of the wage claims were in favor of *Beau Silverton,* an individual.

Comments on Appellant's "Legal Proceedings Below."

Appellant's version of the proceedings below again is focalized on the position that the Local Union 898 is a party, by stating "Local 898 commenced an action. . . ." and "It is from the judgment of dismissal of the first 13 causes of action that *Local 898* prosecutes this appeal." (Emphasis ours; Appellant's Op. Br. p. 2.) However, the title of the complaint [Tr. of Rec. p. 3] and paragraph

VI of first cause of action [Tr. of Rec. p. 5] plainly indicate that party *plaintiff* is Beaumont Silverton. Reference throughout the record further indicates plaintiff *singularly;* reaching the *only* conclusion that Beaumont Silverton *only* is the plaintiff and appellant.

Appellant claims the action was commenced by Local 898 for ". . . an accounting and damages, . . ." (Appellant's Op. Br. p. 2), but by reference to the complaint, and in particular paragraph VII of the first cause of action [Tr. of Rec. p. 5], and paragraph II of each of the causes of action from the second through the thirteenth, each paragraph referred to says: "That prior to the commencement of this action *the obligation herein sued upon* . . .," (emphasis ours); and by further reference to the prayer of the complaint [Tr. of Rec. p. 22], it appears without doubt that the first thirteen causes of action are actions by plaintiff upon wage claims. There are no allegations as particularly concerns any damage to Local 898, the only damages prayed for are the wage claims as prayed for in paragraph I of the prayer of the complaint [Tr. of Rec. p. 22].

Preliminary Statement.

The determining question on this appeal is apparent, namely, does Section 301 of Labor Management Relations Act of 1947, 29 U. S. C. A. 185, confer upon a United States District Court jurisdiction over an action brought by Appellant for unpaid wage claims of employees, as asserted by Appellant as assignee, in the first thirteen causes of action, absent diversity of citizenship?

ARGUMENT.

I.

Examination of the Westinghouse Case.

The *Westinghouse* case was an action between a Union representing employees and an employer for unpaid wage claims, allegedly in violation of collective bargaining contract negotiated by Union, absent diversity of citizenship. Complaint asked for declaratory relief, accounting, and the actual payment of the wage claims. The Supreme Court, in its opinion, held that such a cause of action was not comprehended by Section 301 of the Labor Management Relations Act and, therefore, complaint should be dismissed for want of jurisdiction.

In the opinion of the Supreme Court, six members held that Section 301 did not confer jurisdiction over such action in Federal Court, and there were three views expressed by the majority of the Court in arriving at same conclusion.

Mr. Justice Frankfurter authored the opinion of the majority, in which Mr. Justice Burton and Mr. Justice Minton joined. The opinion examines the language and legislative history of Section 301 and other related sections of the Labor Management Relations Act of 1947 and concluded that Congress intended to limit Section 301 to a grant of jurisdiction or a "forum" in cases only arising out of a breach of a collective bargaining agreement between Union and employer. (Generally, 348 U. S. at p. 460, 75 S. Ct. at p. 500, 99 L. Ed. at p. 524.)

Mr. Chief Justice authored a separate opinion in which Mr. Justice Clark joined. This opinion agrees with the conclusion reached in Mr. Justice Frankfurter's

opinion but disagreed on the reasoning to arrive at the conclusion. The reasoning of this short opinion was based on "statutory interpretation," and held under Section 301, that Congress did not intend "to authorize a union to enforce in a Federal Court the uniquely personal right of an employee. . . ." (348 U. S. at p. 461, 75 S. Ct. 501, 99 L. Ed. at p. 525.)

Mr. Justice Reed authored a further separate opinion. This opinion also agrees with the conclusion reached in Mr. Justice Frankfurter's opinion, but upon the ground that the wage claim did *not* grow or arise out of a collective bargaining contract, but that the "claim for wages for the employees arises from separate hiring contracts between the employer and each employee. . . . The facts show an alleged violation of a contract between an employer and an employee—a situation that is not covered by statute." (348 U. S. at p. 464, 75 S. Ct. at p. 502, 99 L. Ed. 527.)

II.

Application of Westinghouse Case Generally.

Since the decision of the Supreme Court, the lower Federal Courts in their application of the *Westinghouse* case to controversies concerning claims of a peculiarly personal nature, *i.e.,* wage claims, pension plans, and the like, have unanimously held that the Federal Courts do not have jurisdiction under Section 301, absent diversity of citizenship.

The First Circuit Court commented and said that the *Westinghouse* case,

> "has sharply curtailed the subject matter jurisdiction of Federal Courts under Section 301 to adjudicate

directly between union and employer over 'terms of a collecting agreement relating to compensation, terms peculiar in the individual benefit which is their subject matter and which, when violated, give a cause of action to the individual employee.' . . . However, the effect of the Westinghouse holding, reflected in all opinions of the majority justices, was to eliminate from Sec. 301 jurisdiction a complaint by a union that involves no more than a cause of action which is 'peculiar in the individual benefit' or 'the uniquely personal right of an employee' or which 'arises from the individual contract between the employer and employee.'" (*Local 205 etc. v. General Electric Company,* 233 F. 2d 85, at p. 100.)

The Third Circuit commented in a controversy by a union and *member* against employer for declaratory judgment, interpreting collective agreement provision regarding pension clause and accrued pension money to employee, and said:

"The contrariety of the three views expressed by the Justices who constituted the majority of the court in the *Westinghouse case* makes it difficult for an inferior court to apply that decision to controversies about matters *other than wage claims.* The *Westinghouse* decision necessarily teaches that a controversy about wage claims, even when predicated upon a disputed construction of a collective bargaining agreement, is beyond the power which Section 301 confers upon the federal courts." (Emphasis ours.) (*United Steelworkers, etc., et al. v. Pullman, etc.,* 241 F. 2d 547, at p. 549.)

The Fifth Circuit commented, in a controversy by a union to compel employer to contribute to health and

welfare fund denying that Federal Court had jurisdiction of the controversy and said:

> "Our decision of the jurisdictional point on this appeal is controlled by the ruling of the Supreme Court—(citing *Westinghouse* case), which held that the Federal District Court did not have jurisdiction of the suit." (*International Ladies' Garment, etc. v. Jay-Ann Co.,* 228 F. 2d 632, at p. 633.)

Also similarly,

> *Ferguson-Steere Motor Co. v. International, etc., 507,* 223 F. 2d 842, at p. 843; and
>
> *Lincoln Mills, etc. v. Textile Workers, etc.,* 230 F. 2d 81, at p. 87.

The Seventh Circuit commented, in a controversy by union and individual member against employer to obtain specific performance of arbitration provision of collective agreement, and said:

> "The legislative history of the provision (referring to Sec. 301), as related by the Court in Westinghouse strongly supports the premise that the sole purpose of Congress was to provide a forum, not to create substantive rights." (*United Steelworkers, etc., et al. v. Galland-Henning Mfg. Co.,* 241 F. 2d 323, at p. 325.)

The Ninth Circuit commented in a controversy by union against employer for declaratory judgment that employer owed wages to employee (union member) on wrongful discharge and said:

> "The Supreme Court's decision of March 28, 1955, holds that a Federal District Court has no jurisdiction to entertain such a complaint on either of the

statutes relied upon and cannot award damages sought." (*International Longshoremen's, etc. v. Libby, McNeill & Libby,* 221 F. 2d 225, at pp. 225-226.)

The District of Columbia Circuit commented, in a controversy by union and former employee *individually* and as *President* of Local 506, against employer based upon discharge of employee for violation of employer's rule, and alleged breach of a term of collective agreement, and said:

> "The complaint also says the Company violated a term of the collective bargaining contract that requires notice to be given before penalties are imposed on employees. But a United States District Court has no jurisdiction, under Sec. 301 of the Labor Management Relations Act, 61 Stat. 156, 29 USCA Sec. 185, or otherwise, of a union's claim that employees have been injured by an employer's breach of a collective bargaining contract—(citing Westinghouse Case)." (*United Electrical, etc. et al. v. General Electric Co.,* 231 F. 2d 259, at p. 261.)

It appears without question from the opinions of the various United States Courts of Appeals, as cited aforesaid, that the Federal Courts are applying the *Westinghouse* opinion to all controversies concerning claims of a peculiarly, and uniquely personal nature, *i.e.,* wage claims, pension plans, and are holding that Federal Courts do not have jurisdiction for such type of cases, under Section 301.

III.

Application of Westinghouse Case to Instant Case.

It clearly appears that the instant case is a case against the employer for purported unpaid wage claims, or, in other words, it falls within a "Westinghouse-type-case." True, party plaintiff herein is a bit different, *i.e.,* an *individual, member, representative* and *Secretary* of Local 898, than the case where the union brings action in own name as an entity, but it appears that this difference takes the instant case further away from Section 301. At best, Section 301 provides for "Suits for violation of Contracts between an employer and a labor organization. . . ." There is no provision in the Act for a representative to bring action.

This same point came up for discussion in *Local Union 420, etc., et al. v. Carrier Corporation,* 130 Fed. Supp. 26, and at p. 29 thereof the Court said:

> "I am also of the opinion that the complaint has been instituted by improper plaintiffs. Were we not here met with the insuperable barrier of an illegal contract, and assuming we were dealing with a legal collective bargaining agreement, plaintiffs, as an entity, Section 301(b), Act of June 23, 1947, 61 Stat. 156, might have a right of action against this defendant, if only for nominal damages. Here, however, plaintiffs are not *suing as an entity as provided by the Act* but by a Trustee ad Litem." (Emphasis ours.)

It follows further that *Section 301* limits right to bring suit to a union or employer association entering

into collective agreement and *does not extend to individuals.*

Square D Co. v. United Electrical, etc. (1954), 123 Fed. Supp. 776, at p. 779;

Silverton, et al. v. Rich (1954), 119 Fed. Supp. 434, at p. 436, *et seq.;* and

Schalte v. International Alliance of Theatrical Stage Employees, etc. (D. C. S. D. Cal., 1949), 84 Fed. Supp. 669, affirmed on other grounds 9th Cir., 1950, 182 F. 2d 158, Certiorari denied 1950, 340 U. S. 827, 71 S. Ct. 64, 95 L. Ed. 608, rehearing denied 1950, 340 U. S. 885, 71 S. Ct. 194, 95 L. Ed. 643.

Even if Local 898 was a party in the instant case, and an appellant, the Union could not maintain these actions, as the Union would then be attempting to enforce "uniquely personal rights of employees," that the *Westinghouse* case said a union could not do.

Appellant in Appellant's Opening Brief, at top of page 15, cites the *National Hairdressers' Association v. Pilad Co., 7* Fed. Rules Serv. 17a. 151, Case 1, 3 F. R. D. 199, but on examination of this case we find that it is a patent infringement case and not applicable to the factual situation in the instant case.

An assignment merely transfers the interest of the assignor with assignee "standing in shoes" of the assignor, taking his rights and remedies, subject to any *defenses* which the obligor has against assignor, *Bliss v. Cal. Co-Op Producers,* 30 Cal. 2d 240, at p. 250, and

provided compliance with California Labor Code, Section 300, *et seq.* Procedurally, Rule 17, Federal Rules of Civil Procedure, allows assignee to bring action in own name, on basis of diversity and amount and providing assignment *was not* made for purpose of invoking jurisdiction of Federal Court. (3 *Moore's Federal Practice,* (2d Ed.), at p. 1329.) In instant case no diversity alleged; the assignment nor Rule 17 does not change the instant case.

Conclusion.

We respectfully submit that basically this action is for recovery on thirteen purported unpaid wage claims, brought by an *individual* in various capacities, but regardless of the capacity of Appellant, the authorities cited herein clearly establish that the instant case is a "Westinghouse-type-case" and not a "Section-301-case."

We pray that judgment be affirmed.

Respectfully submitted,

HORTON & KNOX, and
JAMES H. CARTER,
By JAMES H. CARTER,
Attorneys for Appellee.

No. 15055

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEAUMONT SILVERTON, individually and as a member, representative and Secretary of Teamsters Local Union No. 898, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and the American Federation of Labor,

Appellant,

vs.

VALLEY TRANSIT CEMENT COMPANY, INC., a corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

JOHN C. STEVENSON,
LIONEL RICHMAN,
1250 Wilshire Boulevard,
Los Angeles 17, California,
Attorneys for Appellant.

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Appellant,

vs.

VALLEY TRANSIT CEMENT COMPANY, INC., a corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

The Union Is a Party to the Action.

Appellee contends strongly in his brief that the Union is not a party to the action since it was commenced in the name of Beaumont Silverton. However, an examination of the pleadings will show that this is a representative proceeding. It was commenced by Beaumont Silverton individually and as a member, representative and officer of Local 898, which is an unincorporated association.

Being an unincorporated association, the local union, under California law, has no standing in Court except through one of its members authorized to bring an action on its behalf.

The doctrine of virtual representation under which one or more may sue for the benefit of all if a common or general interest exists, rests on considerations of necessity and paramount convenience and was adopted to prevent a failure of justice.

Weaver v. Pasadena Tournament of Roses, 32 Cal. 2d 833.

The type of proceeding which was commenced in this action is sustainable on two grounds as a class suit. The first is that the parties are so numerous so that it is impracticable to bring all in as parties plaintiff. It would certainly be an undue burden upon the plaintiff and the Court if each and every member of an unincorporated association were required to be joined as a party plaintiff or party defendant. Secondly, there is an identity or community of interests in that the enforcement of a collective bargaining agreement is of interest to every member of the association.

Jellen v. O'Brien, 89 Cal. App. 505.

It is customary, and in fact necessary, under California law that an action on behalf of an association be commenced in the names of members of the association on behalf of all of the members.

Florence v. Helms, 136 Cal. 613;

Haggerty v. Kings Co., 117 Cal. App. 2d 470;

Parker v. Bowron, 40 Cal. 2d 344.

Respectfully submitted,

JOHN C. STEVENSON,

LIONEL RICHMAN,

Attorneys for Appellant.

No. 15059

United States
Court of Appeals
for the Ninth Circuit

PANAVIEW DOOR & WINDOW CO., a Corporation, Appellant,

vs.

REYNOLDS METALS COMPANY, a Corporation, Appellee.

Transcript of Record

In Two Volumes

Volume I

(Pages 1 to 456)

Appeal from the United States District Court for the Southern District of California Central Division

FILED

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Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—7-27-56

No. 15059

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NAMES AND ADDRESSES OF ATTORNEYS

Attorneys for Appellant:

MACBETH & FORD,
THOMAS P. MAHONEY,
NORMAN MACBETH,
PATRICK H. FORD,
Suite 906 Halliburton Building,
1709 West Eighth Street,
Los Angeles 17, California.

Attorneys for Appellee:

ADAMS, DUQUE, HAZELTINE,
523 West Sixth Street,
Los Angeles 14, California.

In the United States District Court, Southern District of California, Central Division

No. 18469-WM.

PANAVIEW DOOR & WINDOW CO., a Corporation,

Plaintiff,

vs.

REYNOLDS METALS COMPANY, a Corporation,

Defendant.

COMPLAINT

(Breach of Contract; Breach of Confidential Relationship; Unfair Competition; Injunction.)

Plaintiff alleges the following causes of action:

First Cause of Action (Breach of Contract)

I.

Plaintiff is a corporation duly organized and existing under the laws of the State of California with its principal place of business in Los Angeles County. According to plaintiff's information and belief, defendant is a corporation organized and existing under the laws of Delaware and having a regular and established place of business in this judicial district.

II.

The jurisdiction of this court is founded upon diversity of citizenship between the parties and upon the fact that the matter in controversy, ex-

clusive of interest and costs, exceeds the sum of $3,000.00. [2*]

III.

On or about June 30, 1954, plaintiff and defendant entered into a number of contracts whereby defendant, in return for certain moneys, paid or to be paid by plaintiff to defendant, agreed to make certain extrusion dies for plaintiff and to keep such dies for plaintiff's sole and exclusive use. Said contracts are evidenced and embodied in part in a number of "Original Invoices," "Acknowledgments," and other standard forms used by defendant in the usual course of its business. The clearest written statement of defendant's commitment on the above dies is contained in Paragraph 11 of the "Terms and Conditions" of defendant's Acknowledgments, which reads as follows:

"Equipment. Any equipment (including jigs, printing plates or cylinders, dies and tools, etc.) which Seller constructs or acquires specifically and solely for use on Buyer's order shall be and remain Seller's property and in Seller's sole possession and control. Any charges made by Seller therefor shall be for the use of such equipment only. When Seller has not accepted orders from Buyer for product to be made with such equipment for a period of one year, Seller may then require Buyer to give disposition of the said equipment, and in the event such disposition is not given within thirty (30) days after such demand, Seller

may, without liability, make such disposition as it sees fit or may store the equipment for the account of Buyer, charging Buyer for the storage charges."

IV.

On or about December 1, 1954, and continuing until the date hereof, defendant having made said dies pursuant to said contracts, and all conditions precedent having occurred or been performed, defendant violated its contracts with plaintiff by using [3] said dies to make extrusions for plaintiff's competitors, Windsor Sales, Inc.; Windsor Supply, Inc., and Windsor Manufacturing, Inc., and by delivering such extrusions to such competitors within this judicial district, all without plaintiff's knowledge, approval, or consent.

V.

Plaintiff ordered said dies in order to get extrusions for use in constructing aluminum-sash-and-frame sliding doors, which plaintiff sold under the name "Panador." By violating its contracts as above set forth, defendant made it possible for plaintiff's said competitors to divert large amounts of business from plaintiff; to confuse the buying public as to the source of such doors; and to use extrusions which were needed by plaintiff for its own production, but were diverted by defendant to plaintiff's competitors, though frequently promised by defendant to plaintiff and sorely needed by

plaintiff; all to the damage of plaintiff in the sum of $250,000.00.

Second Cause of Action
(Breach of Confidential Relation)

VI.

Plaintiff realleges the matters set forth in its First Cause of Action above.

VII.

During the two years ending June 30, 1954, plaintiff conceived, developed, and engineered a moderate cost sliding door, to which it applied the trademark of "Panador." Such door included an aluminum frame and an aluminum sash, both of which were constructed of extrusions of various intricate shapes. The design of such extrusions was conceived and reduced to blueprint form by plaintiff.

VIII.

On or about June 30, 1954, plaintiff submitted such blueprints to defendant in trust and confidence for the purpose of [4] facilitating defendant's construction of dies for fabricating the above-mentioned extrusions.

IX.

At the time of submitting such blueprints to defendant, both plaintiff and defendant knew and relied upon the fact that, according to the universal custom of the aluminum extrusion industry, the supplier of extrusions must keep confidential all

information disclosed to it by its customers, whether in blueprint form or otherwise, and must use dies paid for by one customer only for that customer's order.

X.

On or about December 1, 1954, and continuing until the date hereof, defendant wilfully violated plaintiff's trust and confidence in defendant by using said information and dies to make and process extrusions for its own account and for plaintiff's competitors named above; all to the damage of plaintiff in the sum of $250,000.00 as set forth in Paragraph V above.

Third Cause of Action (Unfair Competition)

XI.

Plaintiff realleges all the matters set forth above in its First and Second Causes of Action.

XII.

On or about December 1, 1954, and continuing until the date hereof, defendant unfairly competed with plaintiff by entering into the business of making and selling for its own account extrusions from the dies paid for by plaintiff; revealing to plaintiff's said competitors the design of plaintiff's door and selling to them the extrusions needed therefor (all of which were made from the dies paid for by plaintiff); and financing plaintiff's above competitors by advancing to them credit in the amount of approximately $67,000.00, which financing was

needed by said competitors in order for them to operate. All of said acts were [5] done without plaintiff's knowledge, approval, or consent, and their effect was to damage plaintiff in the sum of $250,000.00 as described in Paragraph V above.

XIII.

Each and every act done by defendants, as aforesaid, was done maliciously and with intent to vex, annoy, and injure the plaintiff in its business, by reason whereof the plaintiff is entitled to punitive and exemplary damages under California Civil Code Section 3294 in the amount of $100,000.00.

XIV.

Defendant is continuing to sell and deliver to plaintiff's said competitors extrusions made from the dies paid for by plaintiff, and defendant is about to sell and deliver such extrusions to a new competitor, to wit, W. P. Fuller & Co., a California corporation, according to the information and belief of plaintiff. As alleged above, such actions by defendant are in violation of the confidential relation between plaintiff and defendant, and are in unfair competition with plaintiff.

XV.

If defendant's actions are allowed to occur and continues, plaintiff's business will be irreparably injured by the confusion created in the minds of the buying public and by the diversion of orders from plaintiff to others. Therefore plaintiff is entitled to an injunction to prevent defendant from continuing such actions.

Wherefore, plaintiff demands judgment against defendant in the sum of $250,000.00 actual damages, plus interest, $100,000.00 punitive damages, and costs, and an injunction against defendant's continuing to sell extrusions made from the dies paid for by plaintiff, and from use of any dies made from designs furnished by plaintiff, and from use of any dies designed to make articles similar to those made with the aforesaid dies paid for by plaintiff.

THOMAS P. MAHONEY,

MACBETH & FORD,

By /s/ NORMAN MACBETH,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed July 27, 1955. [6]

[Title of District Court and Cause.]

ANSWER

Defendant above named answers plaintiff's Complaint on file herein as follows:

Answer to First Alleged Cause of Action

I.

Answering Paragraphs II, III, IV and V thereof, defendant admits that the amount in controversy exceeds the sum of Three Thousand Dollars ($3,000.00). Defendant further admits that it re-

ceived from plaintiff and acknowledged receipt of orders from plaintiff for the manufacture of certain aluminum extrusions, and that it made the dies necessary for the manufacture of said extrusions. Defendant further admits that its acknowledgment of order contained and contains, among other things, in paragraph 11 of the "Terms and Conditions" thereof, the language set forth at page 2, lines 13 to 27, inclusive, of plaintiff's Complaint. Save and except as herein expressly admitted, defendant denies [8] generally and specifically each and every allegation contained in said paragraphs, and in each of them.

Answer to Second Alleged Cause of Action

I.

Answering Paragraph VI thereof, defendant refers to its Answer to plaintiff's first alleged cause of action and by this reference incorporates the same herein as though fully set forth.

II.

Answering Paragraphs VII, VIII, IX, and X thereof, defendant admits that some time during the year 1954 plaintiff submitted to defendant certain drawings for the purpose of showing defendant the type of extrusions plaintiff wished to purchase from defendant. Save and except as herein expressly admitted, defendant denies generally and specifically each and every allegation contained in said paragraphs, and in each of them.

Answer to Third Alleged Cause of Action

I.

Answering Paragraph XI thereof, defendant refers to its Answer to plaintiff's first and second alleged causes of action and by this reference incorporates the same herein as though fully set forth.

II.

Answering Paragraphs XII, XIII, XIV and XV thereof, defendant denies generally and specifically each and every allegation contained in said paragraphs.

Wherefore, defendant prays judgment as follows:

1. That plaintiff taking nothing by reason of its Complaint on file herein;

2. For defendant's cost of suit incurred herein; and

3. For such other and further relief as to the Court may seem proper.

ADAMS, DUQUE &
HAZELTINE,

By /s/ HENRY DUQUE,

/s/ LAURENCE T. LYDICK,
Attorneys for Defendant,
Reynolds Metals Company.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 2, 1955. [9]

DEFENDANT'S EXHIBIT A

[Title of District Court and Cause.]

AFFIDAVIT OF FRANK K. MILES

State of California,
County of Los Angeles—ss.

Frank K. Miles, being first duly sworn, deposes and says:

I am a resident of the County of Los Angeles and I am employed by defendant, Reynolds Metals Company, in the capacity of Regional Credit Manager, which position I have occupied for the last six years. As Regional Credit Manager I have jurisdiction over the nine Western States and Alaska and Hawaii. I have been employed by Reynolds Metals Company in a credit capacity for the past eight and one-half years.

My duties as Regional Credit Manager are to approve all credits within the region of prospective customers and of present customers, and in addition to this, I also handle all of the final collections of the Company in this region. It is my duty to determine whether or not Reynolds Metals Company is to extend credit [11] to any particular customers in this region and the terms and conditions of such credit extension, and my decision in these matters is final insofar as it relates to the extension of credit to this Region.

I am acquainted with Panaview Door & Window Co. and with the principals of that corporation, Mr.

Abe Grossman and Mr. J. L. Reznick. I first became acquainted with Mr. Grossman and Mr. Reznick in connection with another corporation of which they were the principal operators which name was Glide Windows, Inc., to which corporation Reynolds Metals, with my approval, had extended credit commencing several years ago. The last time we extended credit to Glide Windows, Inc., was in early 1953, at which time they were unable to pay their bill. After that time no further orders were entered in the name of Glide Windows, Inc., and I accepted notes from Glide Windows, Inc., for the balance due on their account, said notes being in the total sum of Sixteen Thousand Eight Hundred Twenty-four Dollars and Seventy-two Cents ($16,824.72). To date there still remains a balance due and payable on said notes of Four Thousand Dollars ($4,000.00).

In early 1954, Mr. Grossman and Mr. Reznick again commenced placing orders with Reynolds Metals Company under the corporate name of Panaview Door & Window Co., a corporation which apparently had been recently formed. The first order was placed by Panaview with Reynolds Metals during the month of April, 1954, and was an order for extrusion shapes in the total sum of approximately Sixteen Thousand Dollars ($16,000.00). The order was approved by me during the month of May, 1954, after having reviewed the December, 1953, Balance Sheet of Panaview which showed working capital of One Hundred Sixty-four

Thousand One Hundred Seventy-four Dollars ($164,174.00).

Thereafter, further orders for extrusion shapes were approved for credit by me on the following dates in the following [12] amounts: July, 1954, approximately Seventeen Thousand Eight Hundred Dollars ($17,800.00); October, 1954, approximately Twenty Thousand Dollars ($20,000.00); February, 1955, approximately Sixteen Thousand Seven Hundred Sixty Dollars ($16,760.00). On April 26, 1955, I advised our sales personnel I would be unable to accept and enter any new orders from the Panaview Door & Window Co. until their present past due account, amounting to approximately Fifteen Thousand Fifty-five Dollars ($15,055.00) and the Glide Window account amounting to Twele Thouhand Dollars ($12,000.00) had been paid in full. This decision was based on slow payment in the past and a new Balance Sheet furnished by Panaview, dated February 28, 1955, showing a deficit working capital position of Sixty-one Thousand Six Hundred Thirty-one Dollars ($61,631.00). We did not hold shipments on their order approved in February, 1955, and in this connection, and contrary to the allegations contained in the Complaint on file herein which I have read and the Complaint and Affidavit on file herein which I have read, shipments were continued to Panaview Door & Window Co. in May, June and July of 1955 on the order entered in 1955. In addition, I have offered to extend further credit to the Panaview Door & Window Co. whenever their account is paid in full

and their financial statement justifies it. My records of this date indicate the current account of Panaview shows a debit balance of Six Thousand Seventy-five Dollars and Sixty-six Cents ($6,075.66) and the current account of Glide Windows, Inc., shows a debit balance of Four Thousand Dollars ($4,000.00). A Twenty-three Dollars and Seventy Cents ($23.70) check received from Glide Windows, Inc., this month was returned to us marked by the bank "Not Sufficient Funds."

It is not true, as is alleged in the Complaint, that Reynolds Metals Company ever financed any of the competitors of Panaview Door & Window Co., which are mentioned in the Complaint, to wit, Windsor Sales, Inc.; Windsor Supply, Inc., and Windsor [13] Manufacturing, Inc. Credit was extended on orders from Windsor Supply, Inc., by Reynolds Metals Company, based on financial statement furnished by Windsor Supply, Inc., as of November 30, 1954, showing working capital, Eighty Thousand Two Hundred Dollars ($80,200.00), and a net worth of One Hundred Twenty-six Thousand Three Hundred Dollars ($126,300.00). In addition, we requested and received a guarantee of the Windsor Supply account from Associated Finance Company, which furnished us with their financial statement as of September 30, 1954, showing total assets One Million Four Hundred Sixty Thousand Four Dollars ($1,460,004.00); total liabilities, Eight Hundred Ninety-four Thousand Four Hundred Fifty-nine Dollars ($894.459.00); capital and sur-

plus of Five Hundred Sixty-five Thousand Five Hundred Forty-five Dollars ($565,545.00). The extension of credit and the approval of orders by me to Windsor was done in the normal course of business and as a routine transaction, and was based entirely upon the financial condition of that company and of its guarantor, Associated Finance Company, at the time of entering such orders. The credit which was extended had no relation whatsoever to any accounts we had had in the past with Panaview Door & Window Company, and in extending and approving credit to Windsor I did not have in mind at any time, nor did I consider, any of the previous dealings which we had had with Panaview. They were, so far as I was concerned, two completely unrelated transactions. Contrary to the allegations contained in the Complaint, the extension of credit and the approval of credit by me to Windsor was not done maliciously, or with any intent on my part or on the part of Reynolds Metals Company to vex, annoy or injure plaintiff in its business in any manner whatsoever.

/s/ FRANK K. MILES.

Subscribed and sworn to before me this 14th day of September, 1955.

[Seal] /s/ GRACE M. CRARY,
Notary Public in and for Said County and State.

My Commission Expires Jan. 26, 1957.

[Endorsed]: Filed September 14, 1955.

Received in evidence November 22, 1955. [14]

DEFENDANT'S EXHIBIT C

[Title of District Court and Cause.]

AFFIDAVIT OF HARRY M. SARGEANT

State of California,
County of Los Angeles—ss.

Harry M. Sargeant, being first duly sworn, deposes and says:

I am a resident of the County of Los Angeles and am employed by defendant, Reynolds Metals Company, as Regional General Sales Manager, Parts Division. My duties in this capacity are to promote the sale of both building products and industrial parts in Region 1, which is composed of the eleven Western States.

I have been continuously employed by Reynolds Metals Company since 1937. For the first few years with the Company I worked in various departments in the manufacturing end of the business, such as Production, Chemical Laboratory, Production Manager, Assistant to the Vice President in charge of the Parts Division, for the purpose of learning the business and the [16] Company's operation. In 1943 I was transferred from manufacturing to sales in the Buffalo, New York, sales area. In 1947 I was transferred to Los Angeles as Divisional Sales Manager, and in 1951 I was promoted to my present capacity. During the years that I have worked for Reynolds Metals Company I have become well acquainted with the customs and usages in its busi-

ness and in the business of its competitors and customers both as to manufacturing and sales.

The selling operation of Reynolds Metals Company embraces two divisions, namely, Parts Division and General Sales Division. The function of the Parts Division is to promote the sales of both building products and industrial parts. The function of the General Sales Division is to promote the sales of those products generally referred to as mill products as well as consumer sales, such as "Reynolds Wrap." Included in the industrial parts category are basically those items which we produce from blueprints or drawings according to the customer's specifications, such as washing machine tubs, refrigerator parts, automotive parts, residential window parts, aluminum door parts, etc.

In my capacity as General Sales Manager of the Parts Division, I had no dealings with the Panaview Door & Window Co. people who apparently came to us for the manufacture of extruded shapes and, therefore, cannot make any statements as to what transpired between Reynolds Metals Company and Panaview Door & Window Co. The dealings with Panaview Door & Window Co. were carried on by the personnel of the General Sales Division. I did, however, have dealings with Windsor Supply, Inc., and particularly with Mr. R. G. Gunderson and Mr. C. A. McLin. Windsor was one of the suppliers for W. P. Fuller & Co. for both sliding doors and sliding windows and Reynolds Metals Company was Fuller's supplier of both casement and sliding windows. I renewed my acquaint-

ance with Mr. Gunderson at the suppliers' meeting held yearly by W. P. [17] Fuller & Co. Since I had met Mr. Gunderson through this medium, he called me on the telephone and invited me to lunch some time during the summer of 1954. I met Mr. McLin for the first time at this luncheon meeting. At this meeting Messrs. Gunderson and McLin proposed to sign a materials contract with us for not only their requirements of extruded shapes, but aluminum coil stock as well. The extrusions were required for the door that Windsor was selling to Fuller, and the coil material was for another company of Mr. McLin's which produced aluminum tile. After some discussion, it was determined that Windsor, rather than purchasing extruded shapes only, would buy from us substantially all of the aluminum component parts necessary in the assembling of their sliding door, and that Windsor, using the other component parts which it obtained from other sources, such as hardware, bumpers, vinal, weather stripping, rollers and screws, would assemble and package their own door.

Subsequent to this luncheon meeting, Windsor submitted to us a sample sliding door which they were selling to W. P. Fuller & Co. The door was dismantled by our manufacturing people and the component parts which we were to make were priced by us on that basis according to the sample which had been submitted. Along with the sample of the sliding door, Windsor also submitted samples of their sliding window, as well as samples for tub enclosures and shower doors. In accordance with

our custom, I then prepared quotations for each component that we were to supply, as well as a quotation to cover the tooling costs at our Parts Division plant in Phoenix, Arizona. The quotations were submitted to Windsor and thereafter they placed an order with us for the manufacture of the aluminum components to be assembled by them in the manufacturing of the Windsor sliding door.

Contrary to the allegations in plaintiff's Complaint and Affidavit, which I have read, I at no time in any of my dealings [18] with Windsor, nor did anyone else of our organization so far as I am able to ascertain, ever revealed to them any information with respect to the shape or design of the product of any customer, including Panaview Door & Window Co., all of our quotations having been based upon the sample door given to us by Windsor representatives. Furthermore, at no time have I, nor did anyone else of our organization, sought to sell or deliver extrusions for sliding glass doors to W. P. Fuller & Co.

In all of the years during which I have been employed by Reynolds Metals Company, I know of my own knowledge that it has never manufactured any sliding doors, and at no time during the period referred to in plaintiff's Complaint has Reynolds Metals Company been in competition with plaintiff or any other company in the manufacture and sale of sliding doors.

In my experience in the building products field, there is no basic difference in sliding doors regard-

less of the manufacturer, nor is there anything unique in their design—all are essentially the same. If Reynolds Metals Company were prevented from or enjoined from using any dies which would create or which are capable of producing articles which are the same as or similar in size and shape to the articles produced from the dies which were made by Reynolds Metals Company for the production of extruded shapes ordered by Panaview Door & Window Co., Reynolds Metals Company would suffer irreparable injury in that it would be prevented from carrying on business with many other companies and industries for whom at the present time extruded articles similar in size and shape to the articles produced from the aforesaid dies are manufactured. Furthermore, in view of the present lack of availability of aluminum many other companies and industries dependent upon the Reynolds Metals Company for extrusions would be substantially and irreparably injured.

/s/ HARRY M. SARGEANT. [19]

Subscribed and sworn to before me this 14th day of September, 1955.

[Seal] /s/ GRACE M. CRARY,
Notary Public in and for Said County and State.

My Commission Expires Jan. 26, 1957.

[Endorsed]: Filed September 14, 1955.

Received in evidence November 22, 1955. [20]

DEFENDANT'S EXHIBIT E

[Title of District Court and Cause.]

AFFIDAVIT OF WILLIAM O. YATES

State of California,
County of Los Angeles—ss.

William O. Yates, being first duly sworn, deposes and says:

I am a resident of the County of Los Angeles and am employed by defendant, Reynolds Metals Company, as Regional General Manager, Pacific Coast Region, which comprises ten Western States, Hawaii and Alaska. My duties in this capacity are to supervise sales of industrial mill products, packaging products, and consumer products. I have nothing to do with the Parts Division, my work being with the General Sales Division.

I have been continuously employed by Reynolds Metals Company since 1940. I first started with Reynolds Metals Company in the Chemical Laboratory in Louisville, Kentucky, and then held various manufacturing and technical jobs until 1944, at which [22] time I was promoted into the Sales Division and transferred to Cleveland, Ohio, as Industrial Products Salesman. After selling in Cleveland for one and one-half years, I was promoted to District Sales Manager in Akron, Ohio. In 1949, I was promoted to Divisional Sales Manager in Cleveland. In 1951, I was promoted to Regional Industrial Sales Manager, Pacific Coast Region. In 1954,

I was promoted to Regional General Sales Manager, Pacific Coast Region. During the years I have worked with Reynolds Metals Company in its various departments and divisions, I have become well acquainted with the customs and usages of its business and trade and in the business and trade of its competitors and customers, both as to manufacturing and as to sales.

In my capacity as Regional General Sales Manager, I first came in contact with Panaview Door & Window Co. in the early part of 1954. At that time, I called on Mr. J. L. Reznick who was a former officer of Glide Windows, Inc., and who was also then an officer of the recently formed corporation, Panaview Door & Window Co. The purpose of my call on Mr. Reznick at that particular time was to inquire as to the reason why a long overdue payment of $16,000, which Glide Windows, Inc., owed Reynolds Metals Company for extruded shapes previously delivered to Glide Windows, Inc., had not been met. Mr. Reznick discussed the Glide Windows financial situation with me, and after that subject was exhausted, our discussion turned to the Panaview Door & Window Co. and its business operation. Mr. Reznick informed me that Panaview was desirous of having some extruded shapes manufactured in connection with a sliding door which it was producing and wondered whether Reynolds Metals Company would be interested in manufacturing the extruded shapes required. I told him that Reynolds Metals Company would be interested, assuming that the credit of Panaview was approved

by the Reynolds Metals Company Credit Department and also that Glide Windows would execute promissory notes for [23] unpaid balance due on the extrusions previously delivered to Glide Windows by Reynolds Metals Company. Mr. Reznick agreed to have the promissory notes executed and to submit a financial statement to our Credit Department, sample pictures of the sliding door assembly, and an order for extruded shapes.

In due course, an assembly picture of a sliding door was received by us from Panaview, and the assembly picture was processed by my Extrusion Engineering Department of which Mr. O. J. Meyer is in charge. The assembly picture, which was shown to me, was a full-scale cross-section picture of a proposed sliding door which contained some details as to dimensions and as to the specific component sections of the door. Thereafter, the Extrusion Engineering Department made the necessary detailed section drawings and certain of these sections, upon submission to our extrusion mill, required modifications, which modifications were incorporated in the individual section drawings. In addition to this, I am informed that section assembly tolerances were computed by Mr. Meyer's department and added to the section drawings to insure that the sections were assembled properly and that the door would work. After the modified drawings were agreed to by Panaview, they were submitted to the mill for the making of the die design drawings. Because of the modifications and

the assembly tolerances which were computed by us, it was necessary to produce new dies, and dies were thereafter made and Panaview was charged a nominal service charge for the use of these dies.

By written agreement with Panaview, as is usual and customary in our dealings with customers for whom extruded shapes are made, the dies which we made were to remain the property of Reynolds Metals Company and under Reynolds Metals Company's sole possession and control, and Panaview simply acquired a priority on the use of the dies whenever its orders for extruded shapes were received by us. At no time did we agree by written contract, [24] orally or otherwise, that the dies which were made to produce extruded shapes for Panaview would be used exclusively or solely to produce extrusions for Panaview, as is erroneously alleged in Paragraph III of plaintiff's Complaint, which I have read. While it is the custom in the aluminum extrusion industry for the manufacturer of extrusions to make the dies which will produce the extruded shapes requested by the buyer, they do not necessarily restrict that die to the exclusive use of that particular customer. There are numerous cases in the aluminum extrusion manufacturing business where there are many users of identical or similar extruded shapes. The extruder company makes no inquiries as to how the desired shape is developed or to whom the design or idea therefor belongs, and it would be impossible for it to determine whether or not a particular shape or design has been pre-

viously produced by someone else. As in the case here in question, we made many modifications of the original assembly picture which was submitted to us by Panaview ,and it was not until after such modifications were made that the ultimate design for the die was developed.

There are to my knowledge certain situations where the use of dies are restricted to the particular buyer for whom the dies are made, but these are cases of classified or secret military products or highly specialized, technical, or unique equipment. This was not the case in connection with the Panaview assembly picture, which was the usual routine sliding door assembly. When I first talked with Mr. Reznick about manufacturing extruded shapes for Panaview, nothing was ever then said by him, or at any later date, as to the assembly or design being confidential in nature or that it was unique or out of the ordinary or patented. Contrary to the allegations contained in the Complaint, there was no agreement between Reynolds Metals Company and Panaview to keep any information confidential nor, so far as I know, would it have been [25] customary in the trade to do so unless specifically instructed by the buyer.

On reading plaintiff's Complaint, it is apparent that plaintiff has misinterpreted the meaning of the phrase, "solely for use on buyer's order," which appears in Paragraph 11 of the Terms and Conditions. By custom and usage in the aluminum extrusion industry, this phrase means that the dies which

are made to produce extruded shapes for a particular buyer shall be used solely on orders for extrusions placed by that buyer with seller so long as that particular buyer has an order in process. In other words, when the buyer has an order in process, the dies which were made to fill that order shall be used solely for the purpose of completing that order at that time and shall not be used for any other buyer's order at that time. If it had been the intention of Reynolds Metals Company to use dies exclusively for extruded shapes for a particular buyer and for no other, it would have stated that they would be used solely upon buyer's orders and for no others. This is not the fact and is not what the Terms and Conditions say.

I know of my own knowledge many instances where customers have brought to Reynolds Metals Company doors or windows which have been produced and manufactured, respectively, by other extruders and window manufacturers and have requested Reynolds Metals Company to supply them with identical extruded shapes contained in such doors or windows, which Reynolds Metals Company has done and which practice is followed so far as I know by every other company in the industry.

If Reynolds Metals Company were enjoined from using any of its dies which were made by it to produce extruded shapes for Panaview Door & Window Co., such an injunction would be contrary to and violate the custom and usage in the aluminum extrusion industry and would cause Reynolds Metals

Company to suffer [26] irreparable injury in that it would be prevented, not only in the case of Panaview, but in the case of all of its other customers from following the custom and usage of the trade in using all of the dies which it owns. In addition, if Reynolds Metals Company were enjoined from using any dies which would create or which are capable of producing articles which are the same as or similar to the size and shape to the articles produced from its dies which it made for the production of extruded shapes ordered by Panaview, Reynolds Metals Company would suffer irreparable injury in that it would be prevented from carrying on business with many other companies and industries for whom at the present time extruded articles similar in size and shape to the articles produced from the aforesaid dies are manufactured.

/s/ WILLIAM O. YATES.

Subscribed and sworn to before me this 15th day of September, 1955.

[Seal] /s/ GRACE M. CRARY,
Notary Public in and for Said County and State.

My Commission Expires Jan. 26, 1957.

[Endorsed]: Filed September 15, 1955.

Received in evidence November 22, 1955. [27]

DEFENDANT'S EXHIBIT B

[Title of District Court and Cause.]

AFFIDAVIT OF JAMES M. HAIRSTON

State of California,
County of Los Angeles—ss.

James M. Hairston, being first duly sworn, deposes and says:

I am a resident of Phoenix, Arizona, and am employed by the Reynolds Metals Company in the capacity of Plant Controller of the Phoenix Extrusion Plant. I have been employed in this capacity for more than two years. I first came to work for Reynolds Metals Company in 1946 in Sheffield, Alabama, and was employed at that time as Cost Accountant. In October, 1947, I was transferred to the Sheffield Parts Division Plant as Chief Cost Accountant. At the Sheffield Parts Division Plant I was Cost Accountant for approximately seven months, at which time I was appointed Plant Accountant, serving in that capacity until 1950. I was then transferred to the Reynolds Alloys Company, a wholly-owned [29] subsidiary of Reynolds Metals Company, as Chief Cost Accountant. I served in that capacity until May 15, 1953, and then was transferred to my present location in my present position as Plant Controller.

In the years I have worked for Reynolds Metals Company, I have become well acquainted with the customs and usages of its business with relation to

the costs and manufacturing of extrusions. I am also well acquainted with the customs and usages of the extrusion trade generally and with the practices followed not only by Reynolds Metals Company, but by its competitors regarding the preparation and use of dies for the manufacture of such extrusions.

In the normal course of our business in producing extrusions, we receive from our customers a design or sample for an extruded shape which we contract to supply. At the outset, the Extrusion Engineer in our outlying regional sales offices converts the customer's drawing and/or sample to a cross-sectional configuration with full descriptive dimensions, tolerances, etc. Once the contract of sale has been made, a standard contract order form is prepared along with the necessary extrusion print or sketch. This is submitted through our central production control division to our plant production control division. Upon receipt of the order at the plant level, the extrusion drawing or print is released to the plant tool design department, where the necessary engineering determinations and draftings are made for the manufacture of the extrusion tools. Once the tool design is completed, a tool production order, designated in our plant as a "T" order, is issued releasing the tool design to the tool or die manufacturing department. No die may be fabricated in our die manufacturing department without a "T" order. After the manufacture of the die, which usually requires from one to three weeks,

the actual manufacture of the extruded shape is entered into mill production schedule.

Metal is processed through our mill according to the [30] instructions contained in a master lot ticket. This master lot ticket contains all of the instructions required or necessary to produce one item of a customer's order. There may be several items to a customer's order, and there may be several master lot tickets to each item, depending upon the total quantity to be produced. This master lot ticket represents the schedule for the production of a shape with a given extrusion section number. This same ticket provides a complete list of operations to be performed, the finished dimensions of the product, and the expected yield from the metal alloted to and entered on that particular lot. The metal is then processed through the mill and inspected and packed following the instructions contained in the master lot ticket and is then shipped to the customer.

The history of the Panaview Door & Window Co. orders followed the above course. Its original order, which was received at the plant about the middle of May, 1954, contained several items to be produced from nine different section drawings which had been prepared by the Extrusion Engineering Department in the Los Angeles Regional Sales Office. The required dies and tools were fabricated by our usual manner, and the actual manufacture of the extruded shapes began early in the month of June, 1954.

At no time in any stage of the processing of the Panaview order was there any indication of any kind or nature whatsoever that the work being performed for Panaview or the designs of such work were of a secret, confidential, or unique nature. So far as we were concerned, it was a strictly routine order.

Some time during the month of November, 1954, we received through the Parts Division Plant of the Reynolds Metals Company at Phoenix a production order for the manufacture of extrusions to be further fabricated by the Parts Division Plant and, in turn, shipped to Windsor Supply, Inc., as fabricated parts. The material required by this production order was to be manufactured [31] under eight new extrusion section numbers, numbered 13250 through 13257, inclusive. In the processing of this production order, it was determined that the sections called for were the same as the sections as produced for Panaview. Therefore, following the normal and customary usage and practice of not only Reynolds Metals Company, but to the best of my knowledge of the extrusion industry generally, our existing die tools made under "T" orders, numbered 3318 through 3325, inclusive, which had been previously used by us in producing extruded shapes, numbered 10414 through 10421, inclusive, for Panaview, were now used by us to produce the extrusions called for by the Windsor order.

Contrary to the statement contained in Paragraph V of plaintiff's Complaint, which I have

read, it is not true that extrusions were diverted by us to Windsor Supply, Inc., or any other competitor of plaintiff. In using our existing die tools to produce extruded shapes called for by the Windsor order, there was at no time any interference with any of the existing Panaview orders or with the production schedule of any Panaview orders, nor was there at any time any diversion of extrusions from Panaview for the benefit of Windsor. At no time were the existing die tools above referred to used in such a manner as to in any way harm or damage Panaview.

Contrary to the allegations contained in Paragraphs IX and X of the plaintiff's Complaint, and irrespective of the alleged universal custom of the aluminum extrusion industry mentioned in those paragraphs, at no time, to the best of my knowledge, did Reynolds Metals Company divulge to Windsor or to any other competitor of Panaview any information which it received in blueprint form, or otherwise, from Panaview. The extruded shapes which were ordered by Windsor from Reynolds Metals Company were brought to Reynolds Metals Company in the form of an assembled sliding door which had been for sale on the open market for some [32] months prior to its submission to Reynolds Metals Company.

/s/ JAMES M. HAIRSTON.

Subscribed and sworn to before me this 15th day of September, 1955.

[Seal] /s/ GRACE M. CRARY,
Notary Public in and for Said County and State.

My Commission Expires Jan. 26, 1957.

[Endorsed]: Filed September 15, 1955.

Received in evidence November 22, 1955. [33]

DEFENDANT'S EXHIBIT D

[Title of District Court and Cause.]

AFFIDAVIT OF O. J. MEYER, JR.

State of California,
County of Los Angeles—ss.

O. J. Meyer, Jr., being first duly sworn, deposes and says:

I am a resident of the County of Los Angeles and am employed by defendant, Reynolds Metals Company, as Regional Extrusion Engineer. My duties in that capacity are: (1) To assist various Company representatives in their contracts with the aircraft companies, architects, window and door manufacturers and various other customers where technical counsel is required; (2) To investigate product quality complaints, and (3) To supervise the operation of the Los Angeles Extrusion Engineering Department. This includes processing of prospective

customers' inquiries requiring pricing quotations, suggested design ideas for a particular end use, solution of critical tolerance problems, and [35] extrusion drawings on finalized shapes ready for ordering and manufacturing. On occasions I create designs for extrusions from my own ideas or from suggestions made by prospective customers.

Normal procedure for handling new extrusion section drawings is to have the customer approve a print of same, which is forwarded to the extrusion mill for record purposes.

I have been continuously employed by Reynolds Metals Company since leaving Purdue University in 1948. My first employment with the Company was as a draftsman in the Extrusion Department at the General Sales Office in Louisville, Kentucky. Thereafter, I became Administrative Assistant to the Architectural Market Division in Louisville, Kentucky, where my principal duties consisted of the designing of extruded sections for customers and prospective customers in the architectural field. After additional training at the Phoenix, Arizona, extrusion plant, I was assigned in 1952 to my present position as Regional Extrusion Engineer with offices in Los Angeles.

During the years that I have worked for Reynolds Metals Company, I have become well acquainted with the customs and usages in its business and in the business of its competitors and customers with respect not only to the manufacture of extrusions, but also to the creative design of extru-

sions and redesign of proposed customers' extrusions.

Some time in April, 1954, my department received a print of an assembly picture and individual extrusions of a sliding glass door from Panaview Door & Window Co. This assembly picture was a full-scale cross-section picture of a proposed sliding door containing some details as to dimensions. My department took this print and by using a combination of dimensions given on the individual extrusion drawings, modification of design on some, and addition of "special assembly tolerances," made the necessary detailed section drawings. Certain of these sections, upon [36] submission to our extrusion mill for acceptability for manufacturing, required modification, and these modifications, at our suggestion, were incorporated in the individual section drawings. In addition, section assembly tolerances were computed by my department and added to the section drawings to insure that the sections would assemble properly and that the door would work. Section drawings made by my department were then, after approval by the customer, submitted to the mill for the making of die design drawings by mill engineering personnel.

At the time of submission to my department of the original cross-section print by Panaview Door & Window Co., there was no indication on the print or otherwise that the information submitted was either secret or confidential. In simple fact, the shapes ultimately designed by my department did

not differ in any substantial manner from other shapes for sliding doors or sliding windows in our files at that time, all sliding door and sliding window shapes being fundamentally similar. It is not at all unusual for a prospective customer to submit a cross-section picture or a sample of a competitor's door to my department with a request for a price quotation on the extrusions needed therefor. To my own personal knowledge, the submission of a print by Panaview Door & Window Co. to us was done in the normal and usual course of business, and there was nothing about the transaction which was in any way confidential, nor was it different from hundreds of other transactions which my department process each year. There was nothing in the Panaview Door & Window Co. design which was unique or unusual nor was I ever in any way instructed that the material which they furnished us should be treated as confidential or classified in any regard.

In the Los Angeles office, my department has made in the last two years more than 1,300 extrusion drawings for the manufacture of extrusions for individual customers, and within Reynolds [37] Metals Company there are more than 15,000 individual extrusion drawings. To my own knowledge and from my experience as an Extrusion Engineer, I know that hundreds of these drawings are similar in shape and design, and in a number of cases, are identical. In the case of the extrusion drawings which we made for Panaview Door & Window Co., there are in our Los Angeles office many extrusion

drawings which we have made for other customers which are similar in design and shape.

If Reynolds Metals Company were prevented from or enjoined from using any dies which would create or which are capable of producing articles which are the same as or similar in size, shape or design to the articles produced from the dies which were made by Reynolds Metals Company for the production of extruded shapes ordered by Panaview Door & Window Co., Reynolds Metals Company would suffer irreparable injury in that it would be enjoined from carrying on business with many other companies and industries for whom at the present time extruded articles similar in size, shape, and design to the Panaview door are manufactured the actual loss from which is unascertainable at this time. Furthermore, in view of the present lack of availability of aluminum, many other companies and industries dependent upon the Reynolds Metals Company for extrusions would be substantially and irreparably injured.

/s/ O. J. MEYER, JR.

Subscribed and sworn to before me this 14th day of September, 1955.

[Seal] /s/ GRACE M. CRARY,
Notary Public in and for Said County and State of California.
My Commission Expires Jan. 26, 1957.

[Endorsed]: Filed September 15, 1955.
Received in evidence November 22, 1955. [38]

PLAINTIFF'S EXHIBIT No. 1

[Title of District Court and Cause.]

STIPULATION OF FACTS

The parties hereto hereby stipulate to the following facts:

1. During the period from April, 1954, through December, 1954, plaintiff ordered from defendant aluminum extrusions as follows:

(a) Customer Order No. P583 dated April 20, 1954, in the approximate sum of $16,000.00, which Order was accepted and final credit approval given by defendant on May 11, 1954, and final shipment of which Order was made on or about October 5, 1954.

(b) Customer Order No. P1085 dated July 12, 1954, in the approximate sum of $20,000.00, which Order was accepted and final credit approval given by defendant on [40] July 15, 1954, and final shipment of which Order was made on or about October 30, 1954.

(c) Customer Order No. P1750 dated September 30, 1954, in the approximate sum of $20,000.00, which Order was accepted and final credit approval given by defendant on October 6, 1954, and final shipment of which Order was made on or about January 22, 1955.

(d) Customer Order No. P2502 dated December 13, 1954, in the approximate sum of $16,670.00,

which Order was accepted and credit approval given on February 3, 1955, which was followed by a hold order from defendant's credit department dated February 17, 1955, and the Order was finally approved and released on February 23, 1955, and final shipment of which Order was made on or about May 31, 1955.

(e) Customer Order No. 3428 dated March 30, 1955, which Order was never accepted or acknowledged by defendant, but the parties reserve the right to produce testimony as to the reason for non-acceptance and non-acknowledgment.

2. Each of the Orders hereinabove in Paragraph 1 set forth, except Order No. 3428, were acknowledged in writing by defendant to plaintiff, which said written acknowledgment contained the Paragraph 11 which is set forth in plaintiff's Complaint.

3. Defendant manufactured nine sets of die tools under "T" Orders numbered 3318 through 3325, inclusive, to produce the extruded shapes ordered by plaintiff which were given Nos. 10414 through 10421, inclusive, and No. 10426. A charge was made by [41] defendant to plaintiff of $1,430.00, denominated on the invoices as "Die Charge Prices," but the parties reserve the right to produce testimony as to the nature of such charge.

4. It is stipulated that defendant used the existing die tools made under "T" Orders numbered 3318 through 3325, inclusive (which had been previously used by defendant in producing extruded

shapes numbered 10414 through 10421, inclusive, for plaintiff) to produce the extrusions called for by the orders thereafter received by defendant from Windsor Supply, Inc., but the parties reserve the right to produce testimony as to the extent of the use of such dies.

Dated: November 17, 1955.

THOMAS P. MAHONEY, and
MACBETH & FORD,

By /s/ PATRICK H. FORD,
Attorneys for Plaintiff.

ADAMS, DUQUE &
HAZELTINE,

By /s/ HENRY DUQUE,

/s/ LAWRENCE T. LYDICK,
Attorneys for Defendant.

[Endorsed]: Filed November 18, 1955.

Received in evidence November 18, 1955.

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS TO DEFENDANT'S PROPOSED FINDINGS OF FACT

Plaintiff herewith objects to the proposed findings and conclusions, on the following grounds:

1. The proposed finding (Paragraph II, page 2) that the dies in question were not made solely for

plaintiff's use is contrary to the judicial admissions of defendant, both before and during the trial, in that the defendant's General Sales Manager, by affidavit and sworn testimony, admitted that Paragraph 11 of the Terms and Conditions did govern the title and use of the dies in this case. (See Ex. E, Aff. of Yates, September 15, 1955, page 3, line 26 to page 4, line 19.)

2. The said proposed finding that the dies were not made solely for plaintiff's use, is erroneous as a matter of law, in that the terminology "Die Charge" on the front side of the Acknowledgment form (Ex. 21) is directly interwoven with the "Terms and Conditions" on the reverse side, to wit, paragraph 11, which is the only provision by which plaintiff agreed to pay any [43] die charges, that is, to pay a die charge for the use of dies made "solely and specifically" for plaintiff's order.

3. The said proposed finding is not only contrary to the preponderance of the evidence, but is in conflict with all the evidence produced by both sides, in that there is no evidence that defendant made these dies for any one's use except for the plaintiff's orders on the acknowledgment of which the dies were listed and upon which a "die charge price" was collected (Ex. 21).

4. The said proposed finding would imply that plaintiff paid a "die charge" for some purpose other than that prescribed by paragraph 11. This would make paragraph 11 an utterly meaningless

clause in the contract. The die charge "price" would therefore be a purchase price under the ordinary meaning of contracts—there being no evidence of any agreement or custom to the contrary. Hence, plaintiff would be the outright owner of the dies, and defendant a mere bailee, within the strict purview of Hollywood Eq. Co. v. Furer, 16 Cal. 2d 184. The liberal Federal Rules of Pleading should persuade this Court to take hold of this problem rather than leaving it for independent litigation.

5. The said proposed finding violates the rule that any ambiguity should be construed against the drafter of the agreement. If there is, therefor, any possible difference in meaning between "die charge" on the front of the acknowledgment and in paragraph 11 on the reverse, that ambiguity must be resolved in favor of plaintiff, which was obviously led to believe that paragraph 11 was applicable. Even defendant's General Sales Manager thought and testified that it was applicable and that these dies were made "solely and specifically for use on buyer's order" (Ex. E, Yates Affidavit).

6. The said proposed finding ignores the fact that the "surrounding circumstances" introduced in evidence showed that defendant had frequently, both orally and in writing, led plaintiff [44] to believe that dies were restricted to the "sole use" of the buyer. The earlier form of contract (Ex. 5) though more specifically prohibitory, would, in ordinarily English, have the same meaning as Paragraph 11. No one reading the different phraseology

would ever dream that the rewording was designed to change the meaning—unless he assumed that the draftsman had an intent to deceive buyer into thinking their die charge payments gave them the same protection they used to get under the old form, but that the draftsman hoped a Court would feel that the word "solely" had been twisted into meaninglessness by combining the two first sentences of the old form (Ex. 5) into one sentence in the new paragraph 11. Compare also the other form used by defendant in Exhibit 15.

7. The purported finding in paragraph II, page 2, line 20 or 21 that "plaintiff paid to defendant a service fee for the use of said dies" can find utterly no support in the evidence—unless paragraph 11 applies to these dies, since it is the only place where plaintiff agreed to pay a die charge for use of dies. If paragraph 11 applies, then the dies are "solely" for plaintiff's use. If it does not apply, then the die charge was a "price," as mentioned on the face of the acknowledgment, and the transaction was prima facie a sale. There being no other evidence, title would pass and plaintiff would be the owner and defendant would be the bailee who clearly violated the rule of the Furer case, 16 C. 2d 184.

8. Plaintiff also objects to the phraseology "service fee" as that term was not used in the contract or in the evidence.

9. The finding No. V against the confidential relation is in conflict with the California law of

contractual protection of ideas, and defendant's plagiarism of plaintiff's design in making a second set of dies and in using the first set for its own profit, is, without contradiction in the proofs, a clear breach of the contract of the parties as understood in California [45] law.

10. The findings against unfair competition are in conflict with C.C. 3369, subdivision 3; although no case has yet applied the statute to an identical situation, the trend of decision indicates that this case is an appropriate one to call forth the application of C.C. 3369 and 3294.

Dated: December 13, 1955.

MACBETH & FORD,

THOMAS P. MAHONEY,

By /s/ PATRICK H. FORD,
Attorneys for Plaintiff.

POINTS AND AUTHORITIES

1. Re: Sole Use of Dies—Judicial Admissions.

The Yates Affidavit (Ex. E, pp. 3-4) takes the position that Paragraph 11 of the Terms and Conditions did apply to these dies but that its meaning was that "Panaview simply acquired a priority on the use of the dies whenever its orders for extruded shapes were received by "Reynolds" (Ex. E, p. 3, lines 30-32). Inasmuch as, by stipulation, plaintiff had orders with defendant at all times up

to June 3, 1955, the defendant's use of the dies for Windsor orders was a clear breach even on Yates' construction of the agreement. Hence, plaintiff would be entitled to damages even though no injunction would lie.

The Yates affidavit, it is submitted, is a judicial admission. It was used by defendant to oppose a preliminary injunction. It was used by defendant as testimony at the trial. The affiant was defendant's principal witness insofar as his title and office was concerned; he was the "General Sales Manager, Pacific Coast Region." (See Ex. E, p. 1, line 24.)

As Wigmore says in his treatise on Evidence, section 2590. [46]

> "The vital feature of a judicial admission is universally conceded to be its conclusiveness upon the party making it * * *."

A supporting Federal case cited by Wigmore from the unfair competition field, and involving an admission that the products were competitive and that public confusion resulted, is Larson Jr. Co. v. Wrigley Jr. Co. (CCA 7th 1819) 253 F. 914, wherein the Court said:

> "In a real and legitimate controversy, a party should be left within the knot of his averments in pleadings and admissions in testimony, unless the Court can find an absolute demonstration from other evidence * * * that under no

circumstances could the averments and admissions be true."

A judicial admission has been held to be conclusive on the party by whom it was made, or to whom it was attributable. Wiget v. Becker (1936) 84 F. 2d 706, 711 [citing Wigmore Sec. 2590].

"* * * [I]t is fundamental that judicial admissions are proof possessing the highest probative value. Indeed, facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them." Hill v. Federal Trade Commission (1941) 124 F. 2d 104, 106.

In affidavits, and direct examination of its witnesses, defendant has asserted, rather than admitted, the applicability of paragraph 11 of its "Terms and Conditions" to the use of those dies. Starting from the same basic premise they only differ in their conclusion. Whereas plaintiff interprets paragraph 11 as granting it an exclusive right, defendant interprets this same paragraph 11 as one establishing only a right of priority. But the point of importance is that both interpretations begin with [47] the wording and intent of paragraph 11.

The fact then that paragraph 11 of defendant's "Terms and Conditions" is applicable to the use of these dies was uncontested.

This evidence then may not be disregarded by the trier of facts. Rash v. Peoples Deposit Bank & Trust Co. (1951) 192 F. 2d 470, 471.

"It is true enough that the rule, though not universal is well established in the Federal courts, and in some state courts, that the uncontradicted testimony of a witness not impeached or discredited in any way, to a plain and simple fact capable of contradiction if untrue, does not raise an issue of fact to be submitted to a jury." Mutual Life Ins. Co. of N.Y. v. Sargent (1931) 51 F. 2d 4, 6.

"When controlling, positive, and uncontradicted evidence is introduced, and when it is unimpeached by cross-examination or otherwise, is not inherently improper, and no circumstances reflected in the record casts doubt on its veracity, then it may not be disregarded, even though adduced from interested witnesses, and no question of credibility or issue of fact is presented for determination by the jury." Nicholas v. Davis (1953) 204 F. 2d 300, 202.

A wilful disregard of the testimony of unimpeached witnesses so far as they testify to facts, will be grounds for a new trial. U.S. v. 2,049.85 Acres of Land (1943) 49 F.S. 20, 23.

The Affidavit of Defendant's Agent Yates Is Admissible Against and Binding on His Principle

An affidavit sufficiently authenticated is competent evidence as an admission that the facts stated in

the affidavit are true. National Steamship Co. v. Tugman (1892) 143 U.S. 28, 31.

Relevant statements or admissions of an agent of a corporation, which are not privileged and confidential, and are within the scope of the agent's authority, are always admissible against [48] the corporation. Takahashi v. Hecht Co. (1931) 50 F. 2d 326. "In such cases they become statements of fact, and as such are binding on the corporation. This is more particularly true when they explain the acts of the corporation out of which the injury complained of arose." Takahashi, supra, p. 328.

As defendant's Regional General Sales Manager Yates was in a position of authority and responsibility, the statements and admissions in his affidavit were within the scope of his authority.

"Under California law where it is shown that a person was given actual, ostensible authority to act for another in a particular matter, any declarations made by the agent at the time of the transaction of the business entrusted or apparently entrusted to him and relating to such business is admissible as part of the res gestae." State Farm Mut. Auto Ins. Co. v. Porter (1950) 186 F. 2d 834, 845.

"Admissions made by an agent of a party will be received in evidence when the agent's powers are broad enough to constitute him the general representative of the principal with broad managerial powers." Moran v. Pittsburgh-Des Moines Steel Co. (1950) 183 F. 2d 467, 472.

Even if the principal does not expressly vouch for his agent's statement, it is admissible against him as an adoptive admission if he acts or conducts his business in such a way as to show by implication that he adopted the statement. Pekelis v. Transcontinental & Western Air (1950) 187 F. 2d 122, 128.

2. Sole Use of Dies—Contract Must Be Construed To Call For.

This point is that the term "die charge" on the front of the Acknowledgment (Ex. 21) must, as a matter of law, refer to the same thing as the term "die charge" in paragraph 11 on the reverse. There could be no ambiguity. (See point 5 for effect of any possible ambiguity.) The contract, read as an entirety, must tie in the use of this term in two places as having the same [49] meaning in each place. Paragraph 11 provides for a die charge for use of dies made "solely and specifically" for buyer's order. No die charges or other special charges were made for use of any other dies or equipment in defendant's plant—even though defendant has judicially admitted that the dies were "a relatively insignificant part of the total equipment used in the manufacture of aluminum extrusions." (Aff. of Beck, dated September 13, 1955, p. 2, lines 27-29.)

A very recent case is Estate of Shuster (1955) 137 A.C.A. 137, in which Fox, J., held that "a word or phrase occurring more than once in a will is presumed to be used in the same sense." This rule of

construction applies to contracts as well as to other documents, like wills. 3 Williston on Contracts, 1780, citing the old maxim Noscitur a sociis. See also: Rock I. Ry. v. Rio G. RR. (1891) 143 U.S. 596, 609; Miller v. Mattice (1931) 35 Ariz. 180, 188.

The California Supreme Court, in a contract case involving a lease, unanimously held:

> "It is a familiar rule of construction that, other things being equal, words used in a certain sense in one part of an instrument are deemed to have been used in the same sense in another." (Pringle v. Wilson, 1909) 156 Cal. 313, 319.

3. Sole Use of Dies—Uncontradicted Evidence Is That Dies Were Made Solely for Plaintiff's Order.

Although counsel for defendant ignored his own prior judicial admissions and argued that plaintiff needed some separate evidence that these dies were made solely for plaintiff's order, there was utterly no evidence offered by defendant that it made the dies for any other purpose than to fulfil the specific order placed by plaintiff. Defendant, at that time, certainly had no other use for the dies. According to Yates (Ex. E), paragraph 11 [50] applied and defendant would claim the right of ownership and use of the dies whenever plaintiff had no order in defendant's plant. But until the order was received from Windsor in November, 1954, defendant had no specific use in mind for these dies. That the dies

were made specifically for this order was conceded, and the Acknowledgment Form (Ex. 21) would suffice to prove that fact. The tie-in of the die charges on that Acknowledgment with paragraph 11 on the reverse thereof—which is the only reference to what die charges mean—shows that the die charges were for use of dies made "solely and specifically" for plaintiff's order. No other construction would be reasonable. No other evidence was proffered.

Defendant's specious defense of "custom" was abandoned at the trial, with the lame excuse that it was abandoned as a defense to Count One because plaintiff had abandoned any attempt to prove a different custom under Count Two—relying instead on the evidence of the past practice between Reynolds and other corporations and the general law of confidential relations and plagiarism. This abandonment of the custom defense, and the shifting to a new defense at the opening of the trial—a defense in direct conflict with the sworn statement of defendant's own General Sales Manager (Ex. E, Yates)—should be weighed most seriously by this Court in determination of the good faith of the defense!

4. Die Charge Price—Implied Sale Unless Paragraph 11 Applicable.

If a written contract lists certain dies and a "die charge price," certainly the common ordinary meaning of the terminology would be that a sale has

occurred. The dies would then belong to the buyer, and use by the seller as bailee would be strictly within the factual limits of Holly Eq. Co. v. Furer, 16 C. 2d 184.

Defendant's only alternative to avoid that strict application, it would seem, is to concede that paragraph 11 on the reverse of the contract defines "die charge" to mean a sort of [51] "rental" charge applicable whenever dies are made "solely and specifically" for plaintiff's order.

The ambiguity on which defendant must rely to escape from paragraph 11 is to argue that "die charge" as used on the front of the contract had a different meaning than when the same phrase was used in paragraph 11. Because, if the meaning was the same the die charges were paid for use of dies made "solely" for buyer's use.

Assuming that there is an ambiguity, then the law requires that the ambiguity be construed in favor of plaintiff.

Hay v. Allen
(1932) 112 C.A. 2d 676.

Myers v. Alta Con. Co.
(1951) 37 C. 2d 739, 743.

If it is possible to escape from the rule by parol evidence, the burden was on defendant, not on plaintiff. Hence, the Court erred in holding that plaintiff had not met the "preponderance."

Laidlaw v. Marye
(1901) 133 C. 170.

Kirkpatrick v. Pye
(1922) 59 C.A. 125.

Balfour v. Fresno Co.
(1895) 109 C. 221.

Keller v. Hiers
(1951) 108 C.A. 2d 424.

6. Defendant's Own Attorney Interpreted the Contract in the Same Way Plaintiff Understood It.

Counsel for plaintiff find it impossible to believe that their client's understanding of the contract was not sound, inasmuch as a letter from defendant's own house counsel is substantially in agreement with our position.

A copy of the letter is attached hereto as an exhibit. Counsel for defendant was shown this letter during the recess just prior to the announcement in open court that he withdraw his defense of "custom and usage."

Respectfully submitted

THOMAS P. MAHONEY,

MACBETH & FORD,

By /s/ PATRICK H. FORD,
Attorneys for Plaintiff. [52]

EXHIBIT

Reynolds Metals Company
General Offices, Richmond, Virginia

Address reply to
General Sales Office
2500 South Third Street
Louisville 1, Kentucky

April 28, 1955.

Frank T. Cotter, Esquire,
Wilson, Selig & Cotter,
650 South Grand Avenue,
Los Angeles 17, California.

Dear Mr. Cotter:

Although you find paragraph 11 in our terms and conditions ambiguous, I am pleased to know that you consider our form above par. I shall try to clarify the "ambiguities" under paragraph 11.

(a) You cannot remove a die and put it in another shop.

(b) When a service charge is made for the die, we cannot use it for other customers.

(c) We pay personal property taxes.

(d) We pay for maintenance, repair and replacement.

With regard to using the die for another customer, we assume no obligation not to make an identical die for another customer; that is, we assume

no obligation in connection with the design of the die.

I assume that you know that the charge paid by a customer for a die does not represent the die's purchase price. In some instances the charge is only a fraction of the purchase price of the die; in others, the charge is in excess of the purchase price. In the latter situation, the charge is based on the anticipated short life of the die, on the cost of adapting other equipment for use with the die, or perhaps both.

I hope the foregoing explains our equipment provision to your satisfaction. Since one of our terms of sale is involved in your problem, I am naturally curious to know the nature of the problem. If you find it necessary to write further, perhaps you could tell me why our provision is relevant to your client's matter.

Very truly yours,

/s/ JOHN H. GALEA,
Attorney.

JHG:jh

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 15, 1955. [53]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for trial on November 18, 1955, in the Courtroom of the Honorable William C. Mathes, Judge Presiding, the Court sitting without a jury, a jury having been waived by the parties hereto. Plaintiff appeared through its attorneys of record, Thomas P. Mahoney, Esquire, and Messrs. Macbeth & Ford, by Patrick H. Ford, Esquire, and defendant appeared through its attorneys of record, Messrs. Adams, Duque & Hazeltine by Henry Duque, Esquire, and Lawrence T. Lydick, Esquire. Evidence, both oral and documentary, was taken on behalf of the parties, and the matter having been submitted to the Court for consideration, and the Court having duly considered the same, now makes its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

I.

It is true that plaintiff is a corporation duly organized [55] and existing under the laws of the State of California with its principal place of business in Los Angeles County and that defendant is a corporation duly organized and existing under the laws of Delaware and having a regular and established place of business in this judicial district. It is also true that the jurisdiction of this Court is founded upon diversity of citizenship between the

parties and upon the fact that the matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3,000.00).

II.

It is true that some time during the months of April, May, or June, 1954, plaintiff placed with defendant and defendant received from plaintiff orders for the manufacture by defendant of extrusion dies to be used in producing extruded shapes for a sliding door and that defendant acknowledged said orders in writing, which said acknowledgments contained certain Terms and Conditions, including therein a Paragraph 11 which is set forth in Paragraph III of plaintiff's Complaint. It is also true that after said extrusion dies were manufactured by defendant, plaintiff paid to defendant a service fee for the use of said dies in the manufacture of extruded shapes therefrom. It is not true, and plaintiff has failed to establish by a preponderance of the evidence, that the dies in controversy were constructed "solely for use on buyer's order" within the meaning of Paragraph 11 of the Terms and Conditions set forth in Paragraph III of plaintiff's Complaint, nor is it true that defendant at any time agreed to keep such dies for plaintiff's sole and exclusive use.

III.

It is not true, as is alleged in Paragraph IV of plaintiff's Complaint, that defendant violated its contract by using the aforesaid extrusion dies to make extrusions for plaintiff's competitors, and in

this connection, the Court finds that [56] while said dies were at one time used by defendant to produce extrusions for Windsor Supply, Inc., such use was not in violation of any contract or contracts existing between plaintiff and defendant.

IV.

It is true that the dies which were manufactured by defendant for plaintiff were to be used in producing extruded shapes for the construction of an aluminum sliding door which plaintiff sold under the name of "Panador," but the Court finds that plaintiff has failed to establish by a preponderance of the evidence any of the other allegations set forth in Paragraph V of plaintiff's Complaint on file herein and that each of the said allegations is untrue. The Court further finds that plaintiff has not been damaged in the sum of Two Hundred Fifty Thousand Dollars ($250,000.00) or in any other sum whatsoever.

V.

It is true that some time prior to June 30, 1954, plaintiff conceived and developed a sliding door to which it applied the name of "Panador," which said door included an aluminum frame and an aluminum sash of various shapes, and that the drawings of such extruded shapes were reduced to blueprint form by plaintiff and submitted to defendant in that form. Except as hereinabove in this paragraph found to be true, the Court finds that plaintiff has failed to establish by a preponderance

of the evidence any of the other allegations contained in Paragraphs VII, VIII, IX, and X of plaintiff's Complaint, and that each of the said allegations is untrue. In this connection, the Court further finds that at no time did there ever exist between plaintiff and defendant a fiduciary or trust relationship of any kind or character, nor was there any evidence received in the trial of the action to establish the universal custom of the aluminum extrusion industry with regard to the matters in the allegations contained in the [57] Second Cause of Action of plaintiff's Complaint.

VI.

The Court finds that each and all of the allegations of Paragraphs XII, XIII, XIV, and XV of plaintiff's Complaint are untrue and that plaintiff has failed to establish by a preponderance of the evidence either or any of such allegations.

Conclusions of Law

From the foregoing Findings of Fact, the Court concludes as follows:

I.

Plaintiff has failed to establish by a preponderance of the evidence that the dies in controversy were constructed "solely for use on buyer's order" within the meaning of the contract alleged in the First Cause of Action of plaintiff's Complaint, and there has been no breach of said contract by defendant, and plaintiff is not entitled to recover any

damages from defendant by reason of any alleged breach of said contract.

II.

There never existed at any time a fiduciary or trust relationship between plaintiff and defendant in connection with the matters referred to in plaintiff's Complaint, nor was there ever any disclosure by defendant of any confidential information furnished to it by plaintiff.

III.

Defendant did not by any act or transaction unfairly compete with plaintiff at any time, nor has defendant ever done any act which would entitle plaintiff to punitive or exemplary damages under California Civil Code Section 3294.

IV.

Plaintiff has not been irreparably or otherwise injured by any of the acts of defendant nor is or has plaintiff at any time ever been entitled to injunctive relief against defendant by [58] reason of any of the allegations contained in plaintiff's Complaint.

V.

Defendant is entitled to judgment, that plaintiff take nothing by reason of its Complaint on file herein; and that defendant have and recover from plaintiff its costs of suit incurred herein.

Let Judgment be entered accordingly.

Dated: December 19, 1955.

/s/ WM. C. MATHES,
Judge.

The within Findings of Fact and Conclusions of Law are hereby approved.

Dated: December .., 1955.

THOMAS P. MAHONEY and
MACBETH & FORD,

By .....,
Attorneys for Plaintiff.

The within Findings of Fact and Conclusions of Law are hereby disapproved as to form.

Dated: December 9, 1955.

THOMAS P. MAHONEY and
MACBETH & FORD,

By /s/ P. H. FORD,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

Lodged December 9, 1955.

[Endorsed]: Filed December 19, 1955. [59]

In the United States District Court, Southern District of California, Central Division
No. 18469-WM

PANAVIEW DOOR & WINDOW CO., a Corporation,

Plaintiff,

vs.

REYNOLDS METALS COMPANY, a Corporation,

Defendant.

JUDGMENT FOR DEFENDANT AND ORDER DENYING INJUNCTIVE RELIEF

This matter came on for trial on November 18, 1955, in the Courtroom of Honorable William C. Mathes, Judge Presiding, the Court sitting without a jury, a jury having been waived by the parties hereto. Plaintiff appeared by its attorneys of record, Thomas P. Mahoney, Esquire, and Macbeth & Ford, by Patrick H. Ford, Esquire, and defendant appeared by its attorneys of record, Adams, Duque & Hazeltine by Henry Duque, Esquire, and Lawrence T. Lydick, Esquire. Evidence, both oral and documentary, was taken on behalf of the parties hereto, and the matter having been submitted to the Court for its consideration and the Court having duly considered the same and having made and filed its Findings of Fact and Conclusions of Law herein, now, therefore,

It Is Hereby Ordered, Adjudged and Decreed that plaintiff take nothing of or from defendant by reason of its Complaint on file herein or by reason of any of the allegations [60] therein contained.

It is further ordered, adjudged, and decreed that plaintiff's Motion for a Preliminary Injunction or for any other injunctive relief be and it is hereby denied.

It is further ordered, adjudged, and decreed that defendant recover its costs of suit incurred herein, taxed at $209.40.

Dated: December 19, 1955.

/s/ WM. C. MATHES,
Judge.

The within Judgment for Defendant and Order Denying Injunctive Relief is hereby approved.

Dated: December . ., 1955.

THOMAS P. MAHONEY and
MACBETH & FORD,

By .....,
Attorneys for Plaintiff.

The within Judgment for Defendant and Order Denying Injunctive Relief is hereby disapproved as to form.

Dated: December 9, 1955.

THOMAS P. MAHONEY and
MACBETH & FORD,

By /s/ P. H. FORD,
Attorneys for Plaintiff.

Receipt of copy acknowledged.
Lodged December 9, 1955.
[Endorsed]: Filed December 19, 1955.
Docketed and entered December 20, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL BY PLAINTIFF

To the Court:

Please take notice that the plaintiff hereby appeals from the judgment in the above case, to the United States Court of Appeals, Ninth Circuit.

Dated: January 12, 1956.

THOMAS P. MAHONEY and
MACBETH & FORD,

By /s/ PATRICK H. FORD,
Attorneys for Defendant and
Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed January 12, 1956. [62]

In the United States District Court, Southern District of California, Central Division

No. 18469-WM.

PANAVIEW DOOR & WINDOW CO., a Corporation,

Plaintiff,

vs.

REYNOLDS METALS COMPANY, a Corporation,

Defendant.

Honorable William C. Mathes, Judge, Presiding.

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Los Angeles, California

Friday, November 18, 1955

Appearances:

For the Plaintiff:
MACBETH & FORD, by
THOMAS P. MAHONEY, ESQ., and
PATRICK FORD, ESQ.

For the Defendant:
ADAMS, DUQUE & HAZELTINE, by
HENRY DUQUE, ESQ., and
LAWRENCE LYDICK, ESQ.

November 18, 1955—1:45 P.M.

The Court: Are there any ex parte matters?

The Clerk: No, your Honor.

The Court: Call the calendar.

The Clerk: Case No. 18469, Panaview Door & Window Co. vs. Reynolds Metals Company.

Mr. Mahoney: Ready for the plaintiff.

Mr. Duque: Ready for the defendant.

The Court: You may proceed on behalf of the plaintiff.

Mr. Duque: Your Honor, may I interrupt counsel before he proceeds? May I introduce to the court Mr. Fred R. Edney of the Law Department of the Reynolds Metals Company from Louisville,

Kentucky, who will be sitting at counsel table but who will not participate in the trial.

The Court: Very well. Mr. Edney is welcome.

OPENING STATEMENT ON BEHALF OF PLAINTIFF

Mr. Mahoney: May it please the court, the position of the plaintiff can be divided into three primary headings. One is that there was indubitably an admitted contract between the plaintiff and the defendant. Two, that there were submissions in confidence by the plaintiff to the defendant of drawings and of the work products of the mind and the minds of the plaintiff's employees. And, three, that the defendant by certain of its acts facilitated the breaking [3*] of the relationships of a customer of plaintiff's, and also facilitated the open competition of that customer with plaintiff.

But, furthermore, under the third heading the plaintiff intends to prove that the defendant actually manufactured substantially what the plaintiff was accustomed to manufacture and sold what it had manufactured under the guise of doors to the former customer of the plaintiff in direct sales competition with the plaintiff; and that it did this for its own profit in competition with the plaintiff.

The Court: That the defendant did it directly?

Mr. Mahoney: That is correct, your Honor. We intend to prove that when these extrusions were

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

taken on the order of defendant from the extrusion department to the parts department, the defendant then placed these extrusions in a condition in which they were substantially equivalent to the condition in which the plaintiff would place them; and that these extrusions, and what had been done with them and the parts supplied by the parts department, were never sold under poundage but were sold as so many doors by Reynolds Metals to the former customer, Windsor Supply Company, by the defendant.

The Court: Sold wholesale, I take it?

Mr. Mahoney: Sold wholesale, that is correct, in the same manner that the plaintiff sold them [4] wholesale.

Now, getting down specifically to the issues here there is no question but that the contract is admitted. There is no question but that the dies were used, the specific dies manufactured from the plaintiff's drawings by the defendant under the contract were used by the defendant to manufacture extrusions not for anybody else who was a third party, but for its own account. The order for the extrusions came from the parts department to the extrusion department, and Reynolds Metals was in a sense buying the extrusions from plaintiff's dies so that it could get into competition with the plaintiff.

Now, fundamentally, while the defendant here has at last admitted that a contract exists, the plaintiff has been somewhat at a loss to determine on what basis the defendant's position in regard to the interpretation of the contract may be.

The Court: Before you leave that—are you coming back to this last contention you mentioned?

Mr. Mahoney: Oh, yes, your Honor, I will get back to that subject in much greater detail.

The Court: Isn't the substance of your contention that the defendant was akin to a contributory infringer to the patent——

Mr. Mahoney: Yet, this is a very interesting case of first impression, your Honor.

The Court: ——that the defendant contributed to the [5] unfair competition of one of your competitors, and contributed by making it possible for your competitor to palm off as his own goods that were essentially those of the plaintiff?

Mr. Mahoney: Well, your Honor, we don't take exactly that position because we feel that the acts of the third party here, other than the fact that the defendant practically set them up in business in competition with us, with the plaintiff, we don't feel that the issue of palming off enters into this case at all.

The Court: Let's analyze that just a moment so I will understand it. I suppose there is nothing illegal. If the defendant wanted to set some competitor up in business, a competitor against some of its customers, I suppose that might be considered unethical or commercially immoral, but not illegal, would it be?

For instance, there is nothing to prevent Reynolds Metals Company, or any other manufacturer, I take it, if they consider it good business to do so, to finance a dozen competitors of their customers.

Mr. Mahoney: Well, as a matter of fact, they do that themselves. They actually, in their own parts department——

The Court: Let's just stay away from that. So that I will be sure to understand it, you don't contend there is anything illegal about that, do [6] you?

Mr. Mahoney: No, your Honor.

The Court: So any unfair competition would have to consist, would it not, in enabling one of your competitors to compete unfairly with the plaintiff.

Mr. Mahoney: Well, it goes further than that, your Honor. To make myself clear on the issue——

The Court: Well, there may be more to it than that, but let's talk about the minimum. The very minimum would be that, wouldn't it?

Mr. Mahoney: Yes, your Honor.

The Court: Now, how is it contended by plaintiff that the defendant, Reynolds Metals Company, here made it possible for one of your competitors to compete unfairly with you, or to engage in an unfair trade practice?

Mr. Mahoney: We don't say exactly that, your Honor. What we say is that the Reynolds Metals Company is engaged in an unfair trade practice themselves.

The Court: Well, in order to say that you must say, must you not—I don't recall the name of this company.

Mr. Mahoney: Panaview Door & Window Co.?

The Court: No, not that one.

Mr. Mahoney: Windsor Supply.

The Court: Windsor.

Mr. Mahoney: Yes.

The Court: You must say, must you not, that Windsor [7] was an agent of Reynolds.

Mr. Mahoney: No, your Honor. If we take—this is a diversity case, and we take the California law which is pertinent thereto. Unfair competition is defined and paraphrased as unfair or fraudulent action, business action on the part of a defendant. And we intend to prove that by that definition the defendant here did engage in unfair and fraudulent tactics to the detriment and harm of the Panaview Door & Window Co.

The Court: Well, if it did, then Windsor did also, necessarily, did it not?

Mr. Mahoney: That is not necessarily so, your Honor. Because what Reynolds did, we contend, was the primary and the essential harm, and that Windsor was just placed in a position to compete directly with Panaview Door & Window Co., the plaintiff here, its former supplier.

The Court: By offering the same product, essentially the same product——

Mr. Mahoney: The identical product to actual customers who had been established, and facilitating what the defendant did here.

The Court: Very well. Then the tort alleged to have been committed by Reynolds is the tort of using plaintiff's dies to make——

Mr. Mahoney: Its own product. [8]

The Court: ——to make doors similar to those

of the plaintiff, substantially identical to those of the plaintiff.

Mr. Mahoney: Identical, substantially.

The Court: Well, you may go that far if you like, but it is sufficient——

Mr. Mahoney: There are a few minor details in the findings, such as rollers and things of that nature.

The Court: And distributing it to the trade, so to speak.

Mr. Mahoney: And particularly to a former customer, and alienating that former customer by virtue of the fact that it had direct access to what really was the plaintiff's.

The Court: Well, that is proof of damage, isn't it, as distinguished from proof of the tort?

Mr. Mahoney: Well, we have many factual ramifications here, your Honor.

The Court: Let us get at it this way: Would not the plaintiff's contention be the same if Reynolds had sold these doors to a half dozen people in the trade?

Mr. Mahoney: Yes, your Honor.

The Court: Or, to be more specific still, to anyone in the trade?

Mr. Mahoney: Yes, your Honor. But the wrong is aggravated by——

The Court: But that goes to damages, does it not?

Mr. Mahoney: That is right. [9]

The Court: Let's talk about the tort itself.

Mr. Mahoney: Yes, your Honor.

The Court: So the tort must be in the wrongful use of the dies, is that it?

Mr. Mahoney: And the information which it got to construct the dies from.

The Court: Let's get at it this way: Suppose there were no dies. Suppose it is an assembled product of some kind, but it is like the plaintiff's. Would your contention be the same?

Mr. Mahoney: I don't think you can actually draw an analogy there, your Honor. If this were just a common ordinary product—well, let's take a common measuring cup, take an aluminum measuring cup, and the defendant here was extruding, if it were feasible and possible to do so, a plurality of measuring cups which were standard on the market, this would be nothing because there was no property right and there was no contract.

The Court: Suppose you took some kind of a product that you could take standard——

Mr. Mahoney: Standard components.

The Court: ——components, stove bolts and nuts and screw them together in a way and they look just like the plaintiff's. There would be no wrong there, I take it, unless Reynolds contributed to the tort of palming off—— [10]

Mr. Mahoney: That is correct, your Honor.

The Court: ——those as plaintiff's goods.

Mr. Mahoney: That is correct.

The Court: And there is no claim of palming off here, as I understand it?

Mr. Mahoney: That is correct.

The Court: So then must we not get back to this:

That the essential tort claimed here is the maluse of the dies?

Mr. Mahoney: And the information which——

The Court: Yes.

Mr. Mahoney: ——was submitted to Reynolds.

The Court: Well, of course, I have no knowledge of that. I was trying to reduce it to its simplest form.

In other words, the wrongful use of what is essentially claimed to be plaintiff's.

Mr. Mahoney: To be reserved for the exclusive use of the plaintiff.

The Court: Yes. So that gets us right back to the contract, doesn't it?

Mr. Mahoney: Well, it is very interesting to notice, your Honor, the drift in the law on the point of view of contracts to so interpret these contracts that there is implicit obligation of good faith.

The Court: But that still gets us back to the contract, doesn't it, and to the interpretation to be placed upon it? [11]

Mr. Mahoney: And the breach of confidential relationship arising out of the misuse of the confidential information submitted.

The Court: That is still a part of the contractual relationship, isn't it?

Mr. Mahoney: Yes, this is the contractual relationship.

The Court: Very well. I think I understand it.

Mr. Mahoney: Now, going back to the contract, your Honor, originally looking at the whole litigation and the pleadings from the point of view of

history, the contract was originally categorically denied in the statement of reasons in support of defendant's objections to plaintiff's motion for a preliminary injunction. Then the defendant changed its grounds and appeared to take the position that the word "solely," in the language of the contract wherein it was stated that the dies were solely for the use of the plaintiff, it appeared to take the position that this word "solely" was to be interpreted perhaps as a word heavy with custom and usage; in other words, that what it meant was that the defendant only had to reserve the use of the dies when it was necessary to complete the orders of the plaintiff. But if there were no orders of the plaintiff in the plant, then it could use the dies for the orders of others. [12]

The Court: Well, the plaintiff claims, as I understand it, that it was entitled to——

Mr. Mahoney: Exclusive use.

The Court: ——all of the extrusions from those dies.

Mr. Mahoney: That is correct. That is our interpretation of the agreement.

The Court: Or, to put it another way, that the defendant was not entitled to make use of the dies for any other purpose at any time except other than the production of extrusions for the plaintiff on plaintiff's order.

Mr. Mahoney: That is our contention, your Honor.

Now, in the supplemental memorandum of law, which has just been submitted and filed here, the

defendant takes a rather perplexing position to the plaintiff.

The Court: Well, perhaps we are ahead of ourselves in taking this up, aren't we?

Mr. Mahoney: All right, your Honor.

The Court: Do you offer in evidence the stipulation of facts, or have you completed your statement?

Mr. Mahoney: These have been offered here.

The Court: Have you completed your opening statement?

Mr. Mahoney: No, your Honor.

Now, the California law on contracts is incontrovertibly to the fact that the words of the contract are to be understood in their ordinary and popular sense. And the plaintiff [13] intends to prove, and can prove, that the burden of proof in this regard rests entirely with the defendant to prove that there was a custom or trade usage which would justify them in imparting to the language of the contract any other meaning than that which is the customarily understood and the common meaning of the words used there.

The Court: I would assume that would be true in any case, would it not, that the parties to the agreement asserting the use of a word in some special sense has the burden of proving the agreement so to use the word?

Mr. Mahoney: Yes, your Honor, and we only accentuate that because we want to make it clear that we have difficulty in understanding the defendant's position in this regard.

Now, on the point of breach of confidence, we intend to prove that the plaintiff was assured by employees of the defendant that such information as was disclosed by the plaintiff to the defendant would be kept in confidence, and that in the course of their dealings as executives and employees of the plaintiff, and also as executives of associated corporations of the plaintiff, they had been informed by rather responsible representatives of the corporation that it was the custom of the corporation to utilize the dies exclusively for the customer that paid the die charge; and also to keep any information which was conveyed by the customer to the defendant in confidence. [14]

On the question of unfair competition, which we think is one of the more interesting aspects of this litigation, the defendant has always taken the position in its pleadings that it was not in any way competing with the plaintiff. However, what the defendant did—and this will be proven—is that it negotiated with the customer, Windsor, of the plaintiff, prior to the time at which Windsor severed its relationship with the plaintiff. And we will show, also, that even if the contract were to be interpreted as meaning that Reynolds was entitled to utilize the dies when there was no order in the plant of plaintiff in behalf of another customer, we can show that there was a continual chain of orders and that the plaintiff was being shorted on his deliveries which considerably handicapped them in their operations, while material was being supplied to Windsor—doors were actually being

supplied to Windsor by the defendant here by utilizing extrusions from the dies of the plaintiff.

The Court: There is no contention of any wrongful palming off.

Mr. Mahoney: No, your Honor. The thing that is most important to understand about this phase of the operation of Reynolds is that its parts department is substantially an independent operation from the extrusion department and acts, in a sense, as a manufacturing outlet for many completely fabricated parts. [15]

For instance, Reynolds manufacturers various types of windows for its own account; and manufactures other articles of that type, and sells these as a wholesaler to distributors, to jobbers and the like. And when the order went from the parts department to the extrusion department, Reynolds was ordering the extrusions from plaintiff's dies in exactly the same manner as it would have if it had ordered extrusions for its own product from its own dies, and was utilizing these extrusions to fabricate, as far as it possibly could, the essential components of a door which was sold to Windsor, which had previously been the customer of the plaintiff.

The Court: Is there any contention here that this door in its structural appearance, or any other aspect, has acquired some secondary meaning in the trade?

Mr. Mahoney: Well, your Honor, there is a contention here because, as a matter of fact, as will be testified to, the remarkable similarity of appearance here where the identical components parts

were supplied to the former customer of the plaintiff naturally enabled the plaintiff—rather, the former customer Windsor to assume the position that it had a continuous supply from the same source of the identical door. So it could walk into its former contact and say, "We are not giving you anything different. We are giving you the same thing, the same dies from exactly the same source." [16]

The Court: Isn't that a palming off?

Mr. Mahoney: Well, there is an element of palming off in that, yes, your Honor. And this greatly facilitated Windsor's success.

The Court: But is there a contention that the plaintiff had established for its doors some secondary significance in the trade?

Mr. Mahoney: It has not been so pleaded, your Honor, but we would be glad to amend the pleading to conform to the evidence here on that question because I think we can produce testimony that this remarkable identity of appearance naturally facilitated the aproach of Windsor, with this product, which it was now buying from the defendant, to customers and laying the customer's fears aside that there would be a new product, an untried product which they would have start in on all over again.

The Court: Only so if this product, by reason of its appearance, or some other quality could be palmed off as being plaintiff's product.

Mr. Mahoney: It can't. It is identical in appearance, and therefore could be palmed off that, implied assurance to the customer, I take it, if he knew something of plaintiff's product.

Mr. Mahoney: Yes. And the customer, the principal customer here, of course, was very conversant. Fuller, which [17] was the principal customer with Windsor, had its connection, of course, was extremely conversant with the product which Windsor had been selling them because they had a tremendous order for purchase.

The Court: In trade parlance, I take it, the defendant was the manufacturer and Windsor was—what? A jobber or distributor?

Mr. Mahoney: The plaintiff, you mean, your Honor, was the manufacturer.

The Court: Reynolds on the defendant's side——

Mr. Mahoney: Oh, yes. Reynolds was taking the position of a manufacturer.

The Court: And Windsor was a jobber or distributor?

Mr. Mahoney: That's right.

The Court: And when you say "Fuller," are you referring to the Fuller Paint Company?

Mr. Mahoney: That is correct.

The Court: They would be the retailer.

Mr. Mahoney: That is correct. Now, the measure of the wrong which the defendant here has brought against the plaintiff is the fact that while the plaintiff was negotiating with Windsor a critical question of payment of a large sum of money for doors which had already been delivered by plaintiff, on the very affidavits of the defendant we know that Reynolds was dealing with the Windsor company, the [18] Windsor Supply Company, to manufacture this door for the Windsor Supply Company.

Therefore, it placed the Windsor Supply Company in a position in which it could immediately sever its relationship with the plaintiff and go into business over night with the identical product, substantially identical product, and compete with the plaintiff in the market.

Now, this is important because there was absolutely no necessity on the part of Windsor to make a copy, to do anything but accept delivery from Reynolds, from its parts department. Therefore, there was absolutely no significant hiatus or gap, so far as time was concerned, and Windsor was able to make its deliveries. If it had been compelled to copy the door from the ground up, if it had been compelled to have die drawings made, if it had been compelled to have dies manufactured, a long period of time would have elapsed. By this time Windsor would not have been a factor in the market at all. Windsor would have been a dead duck. And it was Reynolds' intervention in this picture which placed Windsor in the position to do the damage that it has done.

The Court: That in itself wouldn't be a tort, would it, an actionable wrong?

Mr. Mahoney: When it is performed by fraudulent acts upon the——

The Court: By fraudulent acts do you mean the claimed misappropriation of the use—— [19]

Mr. Mahoney: Of the dies.

The Court: ——of the plaintiff's dies?

Mr. Mahoney: And the confidential information. That is correct.

Does your Honor desire at this time a discussion of the criterion of damage under the applicable California law?

The Court: No, I don't think you need to go into that at this point.

Does the defendant wish to make an opening statement?

Mr. Duque: A very brief one, your Honor. And I also wish to call to the Court's attention a correction in the defendant's answer. At the time the answer was prepared, having been filed on September 2nd, and when the case first came into my office, I was under the impression when I prepared the answer that our client Reynolds Metals Company had prepared a second set of dies identical to the ones that they had prepared for Panaview, and that these dies were used in making the extrusions for Windsor. I subsequently found, by the time the affidavits were filed, that while the second set of dies had been prepared that some of the dies that had been made for Panaview extrusions were used to produce Windsor extrusions. And, consequently, I would like to amend my answer, and particularly paragraph I thereof which denies the allegations of plaintiff's paragraph IV, so as to admit, as we have shown affirmatively in our [20] affidavits, that the dies which were made by Reynolds Metals Company for the production of extrusions for the plaintiff were used by it, in part, to produce some of the extrusions for Windsor Supply Company.

The Court: Do you wish to file a formal amend-

ment, or do you wish to make some amendment by interlineation?

Mr. Duque: Well, your Honor, I suppose I could do it either way. By interlineation I could admit—I think that it has already been covered by the stipulation of facts, your Honor. So, in other words, in the stipulation of facts we admit that those dies were in part used to produce Windsor extrusions. So I think it is covered there. All I wanted to do was clarify the issue to the Court so there would be no misunderstanding that we do not deny that the dies were so used.

The Court: Very well.

Opening Statement on Behalf of the Defendant

Mr. Duque: In reply to counsel's opening statement, the position of the defendant in this case is as follows: We have never admitted that there was a contract existing between the plaintiff and the defendant for the exclusive use of the dies. We admitted at all times that acknowledgments were sent after each order was placed and the acknowledgment contained paragraph 11, which is set forth in plaintiff's complaint. We contend that paragraph 11, which states: [21]

> "Any equipment (including jigs, printing plates or cylinders, dies and tools, etc.) which Seller constructs or acquires specifically and solely for use on Buyer's order shall be and remain Seller's property and in Seller's sole possession and control * * *"——

Our contention is that that is not a contract for the exclusive use. All that says is that if there are any dies which are made specifically and solely for plaintiff's use, that under those circumstances we still retain the property to and the possession and control of those dies. We have never admitted that it is a contract, and we submit that under any reasonable interpretation it cannot be a contract, on its very wording.

We deny there was any other oral contract between the parties for the exclusive use of the dies.

We deny that there was any trust or confidential relationship existing between the parties.

If it becomes necessary to put on our proof in connection with that matter, we will prove that there was no confidential relationship, that we took the order for the dies, took their design—I mean, that we took the order for the extruded shapes, made the dies, produced them in accordance with the usual practice of Reynolds Metals Company, and there was never any trust or confidence or confidential [22] relationship, and if there was any, if it could be treated as such, that the Reynolds Metals Company never violated it in any manner by showing the designs or dies to anyone else.

We submit and intend to prove that there was no unfair competition because there was no competition. We have never been in competition with Panaview. We have never made doors, and we will so prove. We have made extruded shapes and component parts for doors which we have sold to Windsor and to many of the other competitors of Pana-

view, but have never made a door or sold it to the public. So under those circumstances there obviously can't be any palming off. This door has never acquired any secondary meaning. It is a door that you could go out tomorrow or I could go out tomorrow and buy, have somebody break down, extrude the component parts and sell the identical door to the public.

The Court: As I understand it then, the defendant admits that it made use of these dies in question to make extrusions, door shapes——

Mr. Duque: Yes, sir.

The Court: ——identical with or substantially identical with those that it had made for the plaintiff.

Mr. Duque: Yes, sir.

The Court: And that those extrusions so made or component parts of doors made from them were sold to Windsor [23] and other competitors of the plaintiff.

Mr. Duque: Yes, sir. And we admit that other sets of dies identical to the dies that were made for Panaview were prepared by Reynolds Metals Company to produce extruded shapes identical to the Panador. We will prove that the Windsor Company, who was in competition with Panaview, came to Reynolds Metals Company with a Panador and said, "This door is on the market and has been on the market. We would like you to make the component parts and the extruded shapes." And they placed a contract with Reynolds Metals Company. We made the extruded shapes and component parts

and sold them to Windsor. And then Windsor, using those component extruded parts and adding to them the other hardware and other things necessary to build the door, such as the glass and other hardware, took the extruded parts that we made for them, made a door and competed with Panaview.

And that, briefly, your Honor, without going into deep detail is the defendant's——

The Court: Counsel's submission should limit the issues considerably, shouldn't it?

Mr. Mahoney: Yes, your Honor. He has admitted the fact that the door—that the extrusions were made from dies belonging to, or reserved at least under agreement, for the plaintiff; that Reynolds has used these dies.

Mr. Duque: Your Honor, we do not admit that we ever used any dies that belonged to Panaview. The dies that were [24] made——

The Court: The issue between you is as to whether the dies were reserved for the exclusive use of the plaintiff.

Mr. Duque: That is correct, your Honor. But there was never any question and could be no question that the dies at all times belonged to the Reynolds Metals Company and were in their sole possession and control at all times; and that they were never purchased.

The Court: I understand that the plaintiff doesn't make the contention that the plaintiff owned the dies, as such, or owned the property in the dies.

The plaintiff contends that it owned the exclusive use of the dies.

Mr. Mahoney: Well, your Honor, if paragraph 11 of the Acknowledgments is not applicable, and if the contention here is that it is not applicable to this situation and that the dies were not constructed in accordance with paragraph 11, then it is the contention of the plaintiff that it owns the dies outright because there then is no justification whatsoever, if the defendant here chooses to take that position, we will contend that we bought the dies outright.

The Court: Well, as I understand the defendant's contention it is, under this paragraph 11, that notwithstanding the fact that the plaintiff paid for the dies, that it is nonetheless the property of the defendant.

Mr. Mahoney: That is correct, your Honor. [25]

The Court: Is that a fair statement of the defendant's contention?

Mr. Duque: Yes, it is, your Honor.

Mr. Mahoney: That is correct.

The Court: Now, does the plaintiff dispute that question of ownership?

Mr. Mahoney: Your Honor, in accordance with the language of this agreement, the dies only remain the property of the defendant if they were made solely and exclusively for the use of plaintiff. And those are the only dies which remain the property of the defendant.

Now, if they contend that this provision of the Acknowledgments is not applicable here, then the dies were paid for by the plaintiff here and they

paid what is known as the die charge price. The sum of money on the invoice says "price." Next to the technical designation or die number there is a statement which is mimeographed which says "die charge."

The Court: Then the plaintiff contends that the defendant either wrongfully used either its dies, the plaintiff's dies or——

Mr. Mahoney: Or dies which it was holding, had title to but reserved for the exclusive use of the plaintiff.

The Court: Well, I have your point. You may proceed with the evidence. [26]

Do you offer the stipulation of facts?

Mr. Duque: We do.

The Court: Plaintiff's first exhibit?

Mr. Mahoney: Yes, your Honor.

The Court: It may be received in evidence as Plaintiff's Exhibit No. 1.

(The exhibit referred to was marked Plaintiff's Exhibit 1 and received in evidence.)

PLAINTIFF'S EXHIBIT No. 1

[Plaintiff's Exhibit No. 1 is set out in full, pages 39 to 41 of this printed record.]

Mr. Mahoney: I call Mr. Abraham Grossman.

The Court: That paragraph 11, do you have the document that that paragraph is contained in?

Mr. Mahoney: Yes, your Honor. By stipulation with the defendant, at the deposition, we now produce this document and will offer it in evidence as Plaintiff's Exhibit 2, if it will be so received.

The Court: Is it the so-called agreement with respect to the dies?

Mr. Duque: Sir?

The Court: Is this claimed agreement with respect to the dies?

Mr. Duque: This is what plaintiff claims to be the written agreement which relates to the exclusive use of the dies.

The Court: Is there any objection to receiving it in evidence? [27]

Mr. Mahoney: Your Honor, it should be pointed out that this is not the original Acknowledgment here.

The Court: But is a true copy?

Mr. Mahoney: It is a copy of an Acknowledgment which is typical of the Acknowledgment of Reynolds Metals Company. But at the time, and during the deposition, and I think Mr. Duque will recall, the plaintiff testified that it was its custom when these Acknowledgments were received to use them as confirmation and then to discard them. So the original of the document which actually covered the die charges is probably and presumably in the files of the Reynolds Metals Company. But it is identical with this.

The Court: Then both sides stipulate that this document is a true copy?

Mr. Duque: This document is a true copy and

contains the terms and conditions identical to the Acknowledgments which were sent to plaintiff by defendant in connection with the orders that were placed by the defendant.

The Court: So stipulated, Mr. Mahoney?

Mr. Mahoney: Yes, your Honor.

The Court: Then the document is received in evidence as Plaintiff's Exhibit No. 2.

(The exhibit referred to was marked Plaintiff's Exhibit 2 and received in evidence.)

PLAINTIFF'S EXHIBIT NO. 2

SALES CREDIT: 24F25KAVICH | TERMS: [illegible] PRO-FORMA INVOICE | CUST ORD NO: P-1750 | DATE: 9/30/54 | ORD: | PROC UNDER NO: E-66410

SOLD TO
PANAVIEW
13434 RAYMER ST.
NORTH HOLLYWOOD, CALIF.

SHIP TO
HOLD UP SHIPMENT UNTIL RECEIPT OF
CREDIT DEPARTMENT RELEASE
SAME

SHIPPING POINT: PHOENIX | SCHEDULE: NOVEMBER

PAGE 1 OF 2

	DESCRIPTION	PRODUCT CODE ETC.	PRICE	QUANTITY
1	DIE 10414-A (CUST PT #1X) 6063-T5 (63S-T5) EXT.SOLID SHAPE X 10 FT. 2 INCHES	17-10-6340 2	$.424#	4,000#
2.	DIE 10414-A (CUST PT #1X) 6063-T5 (63S-T5) EXT.SOLID SHAPE X 12 FT. 2 INCHES	17-10-6340 2	$.424#	2,000#
3.	DIE 10415-B (CUST PT #2X) 6063-T5 (63S-T5) EXT. SOLID SHAPE X 16 FT. 2 INCHES	17-10-6340 2	$.430#	4,000#
4.	DIE 10415-B (CUST PT #2X) 6063-T5 (63S-T5) EXT.SOLID SHAPE X 12 FT. 2 INCHES	17-10-6340 2	$.430#	2,000#
5.	DIE 10416-A (CUST PT #3X) 6063-T5 (63S-T5) EXT.SOLID SHAPE X 13 FT. 11 INCHES	17-10-6340 2	$.427#	7,700#

ACKNOWLEDGMENT EXTRUDED PRODUCTS

SALES OR USE TAX STATUS B
FOR RESALE.-CALIF.PERMIT #AG-52399

3. PACKING: STD.BOX (DO NOT PACK OVER 400# A BOX)

We acknowledge the receipt of your order and the above is an exact copy of our entry thereof. If there are any errors in or objections to the above, please notify us AT ONCE. If we do not receive such notice, it will be understood that you accept the basis on which we have entered your order and that fulfillment of the order will be undertaken and deliveries will be made under the terms and conditions of the contract evidenced by this Acknowledgment. Any attachments hereto must be referred to hereon.

F. O. B. shipping point. Transportation charges not exceeding those based on rail or truck rates will be prepaid and allowed to destinations within the continental United States on net shipments of 500 pounds or more. Where two or more items are ordered for shipment at one time and such items aggregate 20,000 pounds or more, deductions will be made from prices applicable to those items on the following basis:

Items ordered in quantities 500 through 19,999 pounds each and aggregating 20,000 pounds or more—deduction of $.0075 per pound.

Items ordered in quantities 500 through 19,999 pounds each and aggregating 30,000 through 39,999 pounds—deduction of $.0086 per pound.

Items ordered in quantities of 20,000 through 29,999 pounds each—deduction of $.002 per pound.

REYNOLDS METALS COMPANY
LOUISVILLE, KENTUCKY

BY [signature] WES 10/8

DATED OCT 14 1954

FORM R-222 150 REV 2 53

Dell's Exh A
Hon. Edward
[illegible]

TERMS AND CONDITIONS

1 Contract Between Buyer and Seller This acknowledgment shall constitute the [illegible] with respect to the subject matter hereof, and said contract shall not be amended modified or rescinded except by written agreement signed by [illegible] an official of each party expressly referring to this contract

2. Delays Seller shall not be responsible for any failure or delay in delivery due to [illegible] breakdowns delays of carriers fatal or partial injuries for any reason of [illegible] or subdivision thereof or any similar or dissimilar cause beyond Seller's control, [illegible] liability for failure or delay in delivery shall exclude consequential damages and shall not exceed the [illegible] price applicable hereunder to the material with respect to which such failure or delay occurs. [illegible] agent at its above quantities as specified hereon at the date on which delivery is requested hereunder [illegible] Seller's [illegible] or 2% five percent 5% of the price applicable hereunder to such material [illegible] control to supply the total demands for all materials specified in this order. Seller may [illegible] subsidiaries affiliates and departments or other such [illegible] Seller in its discretion may [illegible] the contract which may be a consequence hereof

3 Tolerances The total order and each delivery hereunder [illegible] products catalog effect at time of [illegible]

4. Warranty Seller undertakes that products sold hereunder to Buyer shall be free from defects in [illegible] specifications This express warranty is in lieu of and excludes all other warranties [illegible] or otherwise Upon receipt of Seller's shipping [illegible] Buyer shall return all defective [illegible] for inspection by Seller at an Seller [illegible] Buyer Defective material or material not [illegible] at Seller [illegible] [illegible] at Seller's election [illegible] [illegible] at Seller's election [illegible] [illegible] [illegible]

Mr. Mahoney: This is a duplicate. The front page has [28] no reference to this case.

Mr. Duque: Let's see that we have the right document.

Mr. Mahoney: We will put in evidence here page 1 of 2 of the document so that we may retain a copy of it.

The Court: Then page 1 comprises Exhibit 2, a single sheet with printing on both sides.

Mr. Mahoney: Yes, your Honor.

The Court: Very well.

Mr. Mahoney: And with the acknowledgment of the reverse thereof.

The Court: Very well. I understand. It is received pursuant to stipulation.

Will you please swear the witness?

ABRAHAM GROSSMAN

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Abraham Grossman.

Direct Examination

By Mr. Mahoney:

Q. What is your name?

A. Abraham Grossman.

Q. What is your address?

A. 7509 Haskell Avenue, Van Nuys, California.

Q. What is your position with the plaintiff corporation? [29]

(Testimony of Abraham Grossman.)

A. I am the president.

Q. As president of the plaintiff corporation what are the functions which you perform?

A. I am the designer and engineer and production head.

Q. When you say you are the designer, what do you mean by that?

A. By conceiving any new product that the company goes into manufacture on. I conceive the idea, make the drawings for it, engineer it and put it into production and am responsible for it on through from that point.

Q. How long have you been associated with the plaintiff corporation in this capacity?

A. Since its inception.

Q. Have you been associated with any other corporations in similar capacities?

A. Yes. Glide Window Company.

Q. Have you designed sliding doors and windows for that company? A. Yes, I have.

Q. Now, when you design a sliding door or window, do you just go into the market place and copy what is available to you? Or do you—well, what is your procedure in this regard?

A. For the products that our company makes I conceive [30] the original design from all the observations and my previous background that allowed me to create something that could meet the conditions that I determined was not met by any other products on the market, any other similar products on the market.

(Testimony of Abraham Grossman.)

Q. Now, what are the essential elements of an aluminum frame sliding door from the point of view of the structural elements. Do extrusions play an essential part therein?

A. They play the most important part in the function and the operation of a sliding door.

Q. Have you ever, in your career as a designer for both Glide Window, Inc., and Panaview Door & Window Co., resorted to the utilization of conventional or stock extrusions in the fabrication and design of your door? A. Not at all.

Q. And why don't you do this?

A. Well, the component extrusions, as a whole, go to make up the door where each part is dependent on certain elements in the mechanics of the door that have to be specially designed to receive those elements. There is nothing on the market from my observation, nor has there been throughout the years that I have been in this field, in research and in what I have come across, determined that any stock part could be used for these, and as a result every single part of our products had to be designed specially for its [31] particular function.

Q. Mr. Grossman, will you explain how you are qualified by education and experience to enter into the designing of these shapes of extrusions applicable for the specific purposes which you mentioned?

Mr. Duque: I object, your Honor. I don't believe that has any bearing on any of the issues in this case. I object to that on the grounds that it is incompetent, irrelevant and immaterial.

(Testimony of Abraham Grossman.)

The Court: Well, is there any issue here but that this witness, or that the plaintiff did furnish the pattern for the die, or the design?

Mr. Duque: So far as I know, your Honor, there is no issue. He has testified and we do not contest it.

The Court: You do not dispute but that it is his creation?

Mr. Duque: We do not dispute that an original drawing which was submitted was apparently his creation.

The Court: Do you wish to ask him if it was then, Mr. Mahoney?

Mr. Mahoney: Yes, your Honor. I wish I could make an offer of proof here that the background of this witness is——

The Court: Well, he might not need any background. If he created it, that is the ultimate thing, isn't it? It will be assumed he was competent to do it because he [32] did it.

Mr. Mahoney: Yes, your Honor. But I think that the testimony of the witness here will go to prove that it takes more than just——

The Court: Very well. The objection will be overruled. I will hear the evidence.

The Witness: My background is architectural, and a number of years in the building field, and in manufacturing sliding doors for these structures right on the field site gave me the knowledge that started me off in the extrusion field.

Q. (By Mr. Mahoney): Now, Mr. Grossman, when did you first go into the manufacture of slid-

(Testimony of Abraham Grossman.)

ing doors which included as component portions thereof aluminum extrusions utilized as both sash and frame members?

A. In the latter part of 1948.

Q. And with what company was this association? A. With Reynolds.

Q. Were you associated with Reynolds as a designer?

A. Oh, you mean what company I was located with?

Q. Yes.

A. No. That was with the Glide Window Company.

Q. At that time did you have any experience with the ordering of material and extrusions from Reynolds Metals Company for sliding doors manufactured from your design for [33] Glide Windows, Inc.? A. Yes.

Q. Can you tell me what the procedure was which was followed in ordering such extrusions?

A. Well, from the original conception, drawings had to be made of each individual shape or each extruded shape. Those drawings were presented to the sales office of the Aluminum Company. The drawings, in turn, were sent to the engineering department of the Aluminum Company for having them redrawn on an individual piece of paper, and when they were all completed they would be sent back to me for my approval. And after checking to see if they were identical with my own original drawings, I would okay them and send them back,

(Testimony of Abraham Grossman.)

and from that point on the material was ordered and the dies went into process.

Q. Now, at the time of your first employment with Glide Windows, Inc., in designing aluminum sash and frame sliding doors, did you ever have any direct contact with any representative of the Reynolds Metals Company in regard to the ordering of dies?

Mr. Duque: To which question I object, your Honor, on the grounds that it is incompetent, irrelevant and immaterial. This is an action for a breach of contract between the plaintiff Panaview Door & Window Co. and the defendant Reynolds Metals Company, not between Glide Window Company and Reynolds [34] Metals Company.

The Court: I assume it is preliminary. Overruled.

The Witness: My first contact was with Mr. Harry Sargeant, then regional sales manager of the Reynolds Metals Company.

Q. Did you ever discuss the policy of the Reynolds Metals Company in regard to the handling of dies which were manufactured by the Reynolds Metals Company in accordance with designs of the customer, to the specific designs of the customer and for which a die charge was made?

A. Yes, we went through all of that in detail.

Q. Can you tell the Court in your own words what the gist of the discussion was, as you recollect it?

(Testimony of Abraham Grossman.)

Mr. Duque: To which question I object on the grounds that no foundation has been laid as to time, place and persons present.

Q. (By Mr. Mahoney): Mr. Grossman, at what time did you have your first meeting with Mr. Harry Sargeant in regard to the discussion of the ordering of the extrusions from the defendant?

A. I don't remember the exact date; sometime in the middle of 1948.

Q. Was there any other person present at these discussions?

A. Yes, I believe a Mr. Matt Silvers and a Mr. Jerry Reznick were present. [35]

Q. Do you recall, in substance, what the discussion related to in regard to the dies?

Mr. Duque: If the Court please, I have no objection to the witness testifying as to what was said by him and what was said by Mr. Sargeant. But I do again object to any conversations in 1948 between Mr. Grossman, as a representative of the Glide Window Company, and Mr. Harry Sargeant, as a representative of the Reynolds Metals Company with regard to company policy.

The Court: What is your purpose?

Mr. Mahoney: Your Honor, here, and as you have seen from your review of the pleadings, there have been allegations that it is the custom of the Reynolds Metals Company particularly, and the custom of the industry as a whole, to utilize dies upon which a die charge has been made and which

(Testimony of Abraham Grossman.)

are manufactured from the designs of the customer for other parties.

The Court: Well, that's the defendant's contention, isn't it?

Mr. Mahoney: That is their contention.

The Court: Very well. This would be rebuttal, would it not?

Mr. Mahoney: Yes, your Honor.

The Court: I would assume you were eliciting an earlier conversation which in later dealings was not repeated because [36] it had been said formerly.

Mr. Mahoney: That is correct, your Honor. In this case Mr. Grossman, it will be proved, relied in all his dealings with Reynolds Metals Company, and subsequently as an officer of Panaview, upon this original conversation with Mr. Sargeant.

The Court: If it goes to the issue of a fiduciary relationship, it will be received on your case. But otherwise it would be rebuttal.

Mr. Mahoney: There is a direct chain here, your Honor.

The Court: You may proceed. The objection is overruled.

Q. (By Mr. Mahoney): Now, Mr. Grossman, can you recall what Mr. Sargeant said at that meeting regarding the policy of the Reynolds Metals Company as to the use of dies manufactured in accordance with the designs of a customer and upon which a die charge was made?

A. Well, only in words to the effect that among other things that we had to determine, inasmuch

(Testimony of Abraham Grossman.)

as we were just starting relationship with the company and we were relatively new in that field, as to our protection on our product by allowing Reynolds to manufacture the material for us, and it was clearly—Mr. Sargeant made us to understand that we would be protected in that the dies would be for our exclusive use.

And at that time I believe it was also stated that unless [37] a period of a year, I believe, no material was ordered from those dies, a letter for permission from our company would allow Reynolds to either destroy the dies or to give them permission to sell them to others.

But those were the explanations on that particular subject in regard to dies.

Q. Do you recall what position Mr. Sargeant held at that time with the Reynolds Metals Company? A. I believe he was sales manager.

Q. Was he sales manager of the extrusion department or of the parts department of the Reynolds Metals Company?

A. I believe it was the extrusion department.

Q. Now, Mr. Grossman, are you experienced with the nature of the different types of dies which are utilized by aluminum extruders and particularly with the general practice of the industry in that regard? A. I believe so.

Q. Now, are there provided by the various aluminum extruders standard part dies?

A. Well, there are what is known as stock dies, yes.

(Testimony of Abraham Grossman.)

Q. And what are these stock dies?

A. Well, these stock dies are various dies that have either been made by the aluminum companies for sale to the general trade, dies which have common shapes, as a rule and for which they have determined there would be a considerable [38] market for. And there are also dies that are undoubtedly dies that have belonged to former customers where the customer no longer had use for them, where they were obsolete, and they had given the company permission to sell material from those dies. Now, for these dies they do not ask a die charge. The price of material from these dies is identical on the sliding scale of quantity and weight as any material run through special dies that they do charge for.

Q. Now, are there any other dies which the aluminum extrusion companies provide for the use of a customer upon which a die charge is not made, other than the standard component dies which you have previously mentioned?

A. That a die charge is not made? Any other dies?

Q. Yes.

A. Unless it was a die for use of processing the aluminum, I would have no knowledge.

Q. Then to your knowledge is it true that when a special die, a die manufactured in accordance with the customer's specifications in the customer's design as ordered, a die charge is always made?

A. Yes.

(Testimony of Abraham Grossman.)

Q. Now, have you ever in your association with either Glide Windows, Inc., or with Panaview Door & Window Co., Inc., ever given the defendant any permission whatsoever to [39] utilize any of the dies which have been manufactured by Reynolds Metals Company and upon which a die charge was made?

A. No.

Q. Has the Reynolds Metals Company ever asked you for permission to utilize the dies of either of the companies with which you are associated, permission to use them for another customer?

A. Yes, they have.

The Court: When was that?

The Witness: That was sometime either the early part of this year or last year when they sent us a letter stating that dies that we had made some time ago, no material had been ordered.

The Court: Apparently your counsel is about to bring that out. I merely asked you because I thought he might be dropping the subject.

Q. (By Mr. Mahoney): I now show you Plaintiff's Exhibit No. 3 for identification.

Mr. Duque: What is that?

Mr. Mahoney: Plaintiff's Exhibit No. 3.

Mr. Duque: And is that what I have here?

Mr. Mahoney: Yes.

The Court: It is a letter, is it?

Mr. Mahoney: It is a letter directed from Reynolds [40] Metals Company, General Offices, Richmond, Virginia, on November 19, 1951, to Glide Windows, Inc., Burbank, California.

(Testimony of Abraham Grossman.)

The Court: Is it stipulated it was sent by the defendant on or about the date it bears, and received by the plaintiff in the regular course of mail?

Mr. Duque: May I ask Mr. Yates, whose name appears at the bottom of the letter, your Honor?

The Court: Yes.

(Whereupon, counsel conferred with defendant's representative.)

Mr. Duque: Yes, your Honor, Mr. Yates tells me this is a true and correct copy of a letter signed by him on or about the date it bears, and mailed to Glide Windows, Inc., of Burbank, California.

The Court: Do you offer it in evidence?

Mr. Mahoney: I now offer Plaintiff's Exhibit No. 3 in evidence.

The Court: It may be received in evidence.

(The document referred to, marked Plaintiff's Exhibit No. 3, was received in evidence.)

Q. (By Mr. Mahoney): I now show you Plaintiff's Exhibit No. 3, which has been stipulated to be a true copy, and ask you whether the initials which appear on the lower portion thereof are your initials? [41] A. Yes.

The Court: Is that the letter you referred to in answer to my question?

The Witness: Yes.

Q. (By Mr. Mahoney): And when your company received this letter did you find that it related to dies which had been manufactured specifically to

(Testimony of Abraham Grossman.)

the order of Glide Windows, Inc., and on which a die charge had been made? A. Yes.

Q. And when you reviewed this letter did you decide to give permission to Reynolds Metals Company to dispose of the dies as they saw fit, in conformity with the contract appearing on the back of their acknowledgment?

Mr. Duque: I object to that on the grounds that it is incompetent, irrelevant, and immaterial.

The Court: It would be immaterial, would it not?

Mr. Mahoney: It is not, I am sure, because I will tell your Honor what this letter discloses and what this——

The Court: The letter is in evidence, but it is immaterial whether he said yes or no in response, isn't it?

Mr. Mahoney: We are going to put in evidence a letter which will show an employee of the company actually did say "No."

Mr. Duque: Well, this letter—I don't know whether your Honor has had an opportunity to read it, but this isn't [42] a letter requesting his permission to use the dies for some other customer. This is a letter which is their form letter and which says that at the end of a period of time in which the dies haven't been used for a year, unless we hear from you to the contrary we are going to destroy them.

The Court: Very well. The objection is sustained to the pending question.

Q. (By Mr. Mahoney): Mr. Grossman, I now

(Testimony of Abraham Grossman.)

show you Plaintiff's Exhibit No. 4 for identification, which is a reply to the Reynolds Metals Company from Glide Windows, Inc., dated December 3, 1951.

The Court: Is it stipulated that the document is the reply sent to Reynolds Metals Company by Glide Windows, Inc., in response to Exhibit 3?

Mr. Duque: This is the first time that I have seen it. Could we have an opportunity at the recess to check it?

The Court: Subject to check, is it so stipulated?

Mr. Duque: We will check in our files. Yes, sir.

The Court: Very well. It is received, if you are offering it, as Exhibit——

Mr. Mahoney: I now offer Plaintiff's Exhibit 4 in evidence.

The Court: It may be received.

(The document referred to, marked Plaintiff's Exhibit No. 4, was received in evidence.)

Q. (By Mr. Mahoney): Mr. Grossman, did you personally review the copy of the letter, Plaintiff's Exhibit 4, which bears the signature of Mr. Max H. Resnick, and which it is contingently stipulated was forwarded to the defendant in response to its original inquiry of November 19, 1951? A. Yes.

Q. Did you have anything to do with the decision in regard to the sending of that letter?

A. Yes.

Mr. Duque: To which question I object on the grounds that it is incompetent, irrelevant, and com-

(Testimony of Abraham Grossman.)

pletely immaterial to any of the issues in this case, your Honor.

The Court: It shows his knowledge of the transaction. Overruled. The answer may stand.

Q. (By Mr. Mahoney): Then, Mr. Grossman, can you, as president of Glide Windows, Inc., and as president of Panaview Door & Window Co., state what your consistent policy has been with regard to the ordering of dies from aluminum extruders such as the defendant here, so far as the maintenance of your right to retain exclusive use to the dies in the possession of the extruder?

Mr. Duque: To which question I object on the grounds that it is incompetent, irrelevant, and immaterial; it calls for a self-serving statement.

The Court: Policy wouldn't be material, would it? [44]

Mr. Mahoney: Your Honor, we are trying to show here that never at any time did the plaintiff give its consent to the defendant's use of any of its dies whatever.

The Court: I would assume that is not in issue. Is it? Is there any contention that the plaintiff ever conferred any consent or permission upon the Reynolds Metals Company to use these dies, apart from that conferred in the original arrangement?

Mr. Duque: There is not. And in addition to that, the witness has already testified that he did not at any time give any consent.

The Court: That will cover it, then, won't it?

Mr. Mahoney: Yes, your Honor, that covers it amply.

(Testimony of Abraham Grossman.)

The Court: We will take the afternoon recess while you gentlemen are considering the document.

(Short recess.)

Mr. Mahoney: Your Honor, the defendant's counsel has graciously provided plaintiff with an acknowledgment of the die order which is referred to in the letter, Plaintiff's Exhibit No. 3. And this acknowledgment bears the date of customer order, 4-7-48, Customer Order No. 1, and states in the column "Sales credit," "42 Sargeant"; and also bears upon the face thereof other pertinent information relating to Order No. 1; and on the reverse thereof bears a printed form, "Terms and Conditions." In paragraph 12 there is [45] specific reference to equipment.

The Court: Do you offer it in evidence?

Mr. Mahoney: I now offer this document in evidence as Plaintiff's Exhibit No. 5.

The Court: Is it stipulated to be a true copy in all respects of what it purports to be?

Mr. Duque: It's stipulated to be the original, your Honor; and the only thing I would like the record to show is that it does come from our files, so that it may be returned at the conclusion of the litigation.

The Court: Very well. It may be received in evidence as Plaintiff's Exhibit No. 5.

(The document referred to, marked Plaintiff's Exhibit No. 5, was received in evidence.)

PLAINTIFF'S EXHIBIT NO. 5 (Received in evidence Nov. 18, 1955.)

TO REYNOLDS METALS COMPANY

PLEASE ENTER OUR ORDER FOR THE FOLLOWING MATERIAL AT THE PRICES AND ON THE TERMS STATED HEREON

DATE OF CUST ORDER	CUST ORDER NO	PRODUCTION ORDER NO	SALES CREDIT	TERMS
-7-48	1		42 SARGEANT	

GLIDE WINDOWS, INCORPORATED

17221 PARTHENIA STREET

NORTHRIDGE, CALIF.

SHIP TO

CHANGE ORDER NUMBER 1

SCHEDULE	F.O.B. TERMS	REQ. DEL.	SHIP VIA
TIME			

SHIP FROM	CORRESPONDENT	CREDIT BY	SCHEDULE BY	WRITTEN BY	VERIFIED BY	PRODUCT CODE
PHOENIX		6-17-51				

QUANTITY ORDERED	CUST ITEM	63ST5 EXT. Shape	PROD. ORD. NO.	UNIT PRICE
3,000#	1.	63ST-5 extruded shape. Customers part #1		
12,000#	2.	63ST-5 extruded shape. Customers part #2		
300#	3.	63ST-5 extruded shape. Customers part #3		
300#	3A	63ST-5 extruded shape. Customers part #3A		
15,000#	4.	63ST-5 extruded shape. Customers part #4		
00#	5.	63ST-5 extruded shape. Customers part #5		
300#	6.	63ST-5 extruded shape. Customers part #6		
300#	7.	63St-5 extruded shape. Customers part #7		

SPECIAL MANUFACTURING INSTRUCTIONS, NO QUALITY REQUIREMENTS RECORD NO

SPECIAL INSPECTION INSTRUCTIONS AND SPEC NOS

FULL PACKING INSTRUCTIONS

INVOICE AND SHIPPING INSTRUCTIONS

GENERAL INSTRUCTIONS

CHANGE ORDER NUMBER 1

CHANGE ORDER NUMBER 1

ORDER IS NOT BINDING UPON SELLER UNLESS AND UNTIL ACCEPTED BY SELLER ON ITS REGULAR ACKNOWLEDGMENT FORM SIGNED BY SELLER. THIS ORDER IS GIVEN SUBJECT, AND IF ACCEPTED BY SELLER WILL BE FILLED BY SELLER UPON THE CONDITIONS SET FORTH ON THE BACK HEREOF, WHICH ARE HEREBY EXPRESSLY MADE A PART HEREOF

PURCHASER _____ BY Abe Grossman Pres

COMPANY NAME TITLE

4

PR 8-819-1

TO RE NOLDS METALS COMP NY

PLEASE ENTER OUR ORDER FOR THE FOLLOWING MATERIAL AT THE PRICES AND ON THE TERMS STATED HEREON

TE OF CUST ORDER	CUST ORDER NO	PRODUCTION ORDER NO	SALES CREDIT	TERMS
1-7-48	1		42 SARGEANT	

GLIDE WINDOWS, INCORPORATED

17221 PARTHENIA STR ET

NORTHRIDGE, CALIF.

SHIP TO

CHANGE ORDER NUMBER 1

EDULE	F O B TERMS	PRO COL	SHIP VIA
JUNE			

FROM	CORRESPONDENT	CREDIT BY	SCHEDULE BY	WRITTEN BY	VERIFIED BY	PRODUCT CODE
HOENIX						

QUANTITY ORDERED	CUST ITEM	DESCRIPTION	PROD ORD NO	UNIT PRICE
300#	7A	63ST-5 extruded shape. Customers part #7A		
00#	8.	63ST-5 extruded shape. Customers part #8		
00#	9.	63ST-5 extruded shape. Customers part #9		

CHANGE ORDER NUMBER 1

CHANGE ORDER NUMBER 1

SPECIAL MANUFAC. ING INSTRUCTIONS QUALITY REQUIRE TS RECORD NO

SPECIAL INSPECTION TRUCTIONS AND : NOS

ULL PACKING IN. CTIONS

VOICE AND SHIP INSTRUCTIONS

NERAL INSTRUC. S

ER IS NOT BINDING UPON SELLER UNLESS AND UNTIL ACCEPTED BY SELLER ON ITS REGULAR ACKNOWLEDGMENT FORM SIGNED BY SELLER. THIS ORDER IS GIVEN S AND IF ACCEPTED BY SELLER WILL BE FILLED BY SELLER UPON THE CONDITIONS SET FORTH ON AND BACK HEREOF, WHICH ARE HEREBY EXPRESSLY MADE A RDER

HASER _____ BY Walter Grossman Pres

COMPANY NAME TITLE

(Testimony of Abraham Grossman.)

Mr. Mahoney: This is technically known as an "Acknowledgment," is it not?

Mr. Duque: That is correct.

Q. (By Mr. Mahoney): Mr. Grossman, I show you the acknowledgment, Plaintiff's Exhibit No. 5, and ask you if you recall the circumstances under which that order referred to therein was made?

A. Yes, I do.

Q. Would you outline briefly the history of that order?

A. Well, I can just say, very briefly, that the [46] procedure that preceded the actual order was identical to the sequence that I just previously stated, in that I supplied the original extrusion drawings which in turn were redone by the aluminum company, presented to me for O.K., and after that the order was processed; where the dies went into manufacture, and from them the aluminum would be run.

Q. And do the two letters, namely, Plaintiff's Exhibit No. 3 and Plaintiff's Exhibit No. 4, refer to dies which are listed in that order, Plaintiff's Exhibit No. 5? A. Yes, they do.

Q. I now show you a pencil drawing on drafting film which bears the designation, "Horizontal sliding door designed by Abe Grossman—4-1-54," and marked for identification as Plaintiff's Exhibit No. 6 for identification, and ask you if that is the original of the drawing which was presented by you to the Reynolds Metals Company as a preliminary to the preparation by that company of dies for the

(Testimony of Abraham Grossman.)

manufacture of extrusions for the Panador on behalf of the plaintiff here.

A. Yes, this is the original.

Q. Can you explain the designation "Full-Light" door in the lower right-hand corner thereof?

A. Well, this previously was a name that we had tied with that, but never actually was used in the final name given the door.

Q. Are the detail drawings of the various extrusions [47] shown in this drawing the extrusions which were utilized in the assembly of the Panador sliding door?

A. All except with a minor change, with the exception of a minor change on one part.

Q. Who made that minor change?

A. I did.

Q. Now, Mr. Grossman, I notice that there are certain designations which appear sequential, such as Part 1 X, Part 2 X, and so forth. What does that refer to?

A. These are the extrusion shape numbers. They are our company numbers. And we use them to define in our shop the various parts by that number.

Q. Are these extrusions copies of well-known shapes? Are these extrusion drawings?

A. No, they are not.

Q. Who created these shapes? A. I did.

Mr. Duque: To which question I will object on the ground that it calls for a conclusion of the witness, your Honor. I have no objection to him testi-

(Testimony of Abraham Grossman.)

fying as to what he actually did. But the question of who created these shapes——

Mr. Mahoney: I will rephrase the question, your Honor.

The Court: Very well.

Q. (By Mr. Mahoney): When you made these drawings did you copy any shapes known to you in the art at the time at [48] which you made the drawings? A. I did not.

Q. Will you explain the nature of the cross-sectional drawings "Jamb" and "Sill," and so designated in Plaintiff's No. 6 for identification?

A. The sill is the bottom member of the frame surrounding the two panels, or any number of panels, of sliding sash.

The jam indicates the side members of that particular frame.

Q. Now, Mr. Grossman, in order that there may be no misunderstanding here, will you explain what your practice was and what the goals were in creating the particular design of the Panador aluminum-frame-and-sash sliding door?

Mr. Duque: To which question I will object, your Honor, on the ground that it is immaterial what his goals were or the other other portion of the question. The ultimate fact is that he prepared these drawings for extrusions and submitted them to the defendant.

The Court: Do you mean by that, what functional result did he attempt to achieve?

(Testimony of Abraham Grossman.)

Mr. Mahoney: Yes. How he was trying to better his product, and in what manner his product was different from the prior art, et cetera.

The Court: Very well. Overruled. You may answer. [49]

Q. (By Mr. Mahoney): Mr. Grossman, to be more specific, in the first place, at the time you conceived and developed and designed the extrusions and the entire assembly of the Panador sliding door, what factors did you have in mind?

A. One principal factor was to create a door that would have the quality that the sliding door needed to make it function well, both from the standpoint of operation and weatherproofing, and yet be very competitive. There was a very great need for a competitive door of this kind for the project or tract type of development that dealt with a mass marketing of merchandise. Up until the time that we came out with this door, all of the aluminum doors, even the most competitive on the market, were far too high in price for this particular type of business.

A door like this was needed principally because the rest of the windows in the house were more and more tending to go to aluminum, and up until the time an aluminum door that could be competitive enough to be used for that kind of a building came out, the contractor was forced to go to a very cheap steel door. The problem was to design a door that had the quality necessary to make it a good door and still make it a very competitive door. This was

(Testimony of Abraham Grossman.)

the problem. And we felt that by designing and coming out with a door like this that we had the problem licked.

Q. And can you explain briefly how the design of [50] the extrusions and the shapes and the assemblies shown in the drawing, Plaintiff's Exhibit No. 6 for identification, solved some of those problems; and particularly the problems of price and function?

A. Yes. Although in many respects the weight of material was not reduced considerably, as might be expected of a competitive door, the element of ease of fabrication was the most outstanding. And one of the principal features of this door included a method of a butt joint that would be sealed behind continuous vertical ribs on the side members of the sash as the members were screwed to the horizontal rails, forming that sash. This was the principal feature that enabled us to produce this door with as little labor as possible, and as a result was very competitive in price.

Q. And, Mr. Grossman, on Plaintiff's Exhibit No. 6 for identification, I notice that the various part numbers have dimensions on various portions of the cross-sections of the extrusions. Can you tell me who placed those dimensions on there?

A. I did.

Q. What was the purpose of these dimensions?

A. Those dimensions were there for the purpose of showing the aluminum company the exact shape and dimensions and the median line or the true line

(Testimony of Abraham Grossman.)

on which the tolerances had to be based. The tolerances, plus or minus, had to [51] revolve about these particular dimensions that were given.

Q. And why was this necessary?

A. So that the function of the fitting of adjacent parts and operating parts could take place so that within those allowable tolerances the items would work as efficiently as possible. Without this, some aspects of the mechanics of the door would operate, but many other important ones would not.

Q. Now, is it true, Mr. Grossman, that when your company, in its general practice, manufactures a door it does not ship an assembled door?

A. Not in the Panador, no.

Q. How is the door shipped?

A. It is shipped in a knocked-down form. Various pieces of extrusions already processed are packed in a cardboard crate, and it is then assembled on the job by the people supplying the glass.

Q. And did you design each of these extrusions to fit one within the other tightly and accurately so that a mechanic of ordinary skill in the field could assemble the frame and sash of the door without any extensive educational process?

A. That is correct.

Q. And is it essential in a door of this type that every one of the extrusions be carefully conceived so that it [52] performs its function in the entire assembly once it is assembled?

Mr. Duque: Your Honor, I haven't objected to these leading questions, but they are now getting to

(Testimony of Abraham Grossman.)

the point where I feel called upon to object to the question on the grounds that it is leading and suggestive.

The Court: Is there any issue about the answer that this would call for?

Mr. Duque: No, there isn't any issue. It is completely immaterial. But it can go on for some time. I also object to it on the ground that it is immaterial.

The Court: It might be helpful in describing for the record and the Court the function of some of these parts, the importance of them. Overruled.

You may answer.

The Witness: Could I hear that question once again, please?

Mr. Mahoney: Will the reporter read the question to the witness?

> (The question was read by the reporter as follows: "Q. And is it essential in a door of this type that every one of the extrusions be carefully conceived so that it performs its function in the entire assembly once it is assembled?")

The Witness: Yes. There are numerous factors that go [53] toward making the door successful or not successful, depending on that particular feature of the various extruded parts fitting with one another, and also having the proper receptacles within its shape to contain all of the other component parts such as weatherstripping and hardware that

(Testimony of Abraham Grossman.)

go directly toward the mechanical operation of the door.

Q. (By Mr. Mahoney): Mr. Grossman, will you relate the manner in which this drawing was submitted, Plaintiff's Exhibit No. 6 for identification, to the defendant, Reynolds Metals Company?

A. The drawing was submitted to one of the salesmen that approached us on a particular time that we were ready to submit these drawings to an aluminum company for extrusions.

Q. Do you recall the name of the salesman?

A. Yes, I do. Al Kavich was the name, K-a-v-i-c-h, I believe.

Q. Now, Mr. Grossman, when you presented the drawings to Mr. Kavich, the drawings which are Plaintiff's Exhibit No. 6 for identification, did you say anything to Mr. Kavich?

Mr. Duque: Your Honor, may we have a foundation laid?

I object to the question on the ground that there is no evidence as to time, place, and as to when the conversation took place.

Q. (By Mr. Mahoney): Mr. Grossman, when did you [54] originally submit the drawings, Plaintiff's Exhibit No. 6 for identification, to Mr. Kavich? A. It was in the spring of 1954.

Q. And was there anyone else present, to your recollection, at that meeting with Mr. Kavich?

A. This meeting, I believe, took place in our drafting room, and our draftsman was present and

(Testimony of Abraham Grossman.)

Mr. Resnick was present; my associate, Mr. Resnick.

Q. Do you recall the name of the draftsman?

A. Gene Ebright.

Q. Mr. Grossman, did you hand Mr. Kavich the drawing? Or was there a preliminary discussion?

A. There was preliminary conversation before I did that. Would you want me to relate that?

Q. You may.

A. The reason Mr. Kavich approached us——

Mr. Duque: If the Court please, I object to any statement as to the reason why anybody did anything. I have no objection to him relating the conversation that took place at that time.

The Court: Guide your witness, Mr. Mahoney.

Q. (By Mr. Mahoney): Mr. Grossman, you should not refer to the reason that any person with whom you dealt might have done something. Confine your testimony to the factual incidents and to the statements that were made by the party with [55] whom you were dealing.

A. Mr. Kavich told me that he had heard that Harvey Aluminum Company was going to get the opportunity to do these extrusions and supply us with material for this particular door, and that he could promise us to beat their schedule by three weeks.

Now, these essence of the success at this particular time in getting the spring market was so important that this particular detail of getting us the material three weeks sooner than we could at

(Testimony of Abraham Grossman.)

any other place was important enough for us to make a decision after promises that this schedule could be met. This was the essence of our conversation. And our minds were made up on that fact, to deal with Reynolds.

Q. Did you say anything further to Mr. Kavich prior to or at the same time as you presented the drawing, Plaintiff's Exhibit 6 for identification, to Mr. Kavich? A. Yes.

Q. What did you say?

A. We made Mr. Kavich aware of the fact——

Mr. Duque: Now, just a moment. If the Court please, I hate to keep interrupting. I have no objection to the witness testifying to what Mr. Kavich said.

Q. (By Mr. Mahoney): I will once again instruct you that such phrases, such as "we made the witness aware," are not apt here. You should say what you told the witness and [56] what the witness said in reply to your statement.

A. All right. I told Mr. Kavich that the product was so revolutionary in the respect of competition, and I also reiterated the need for such a product and told him of the vast potential for the company doing well with this at the right time, that we asked —I asked that he not let this information out and that it be held in strict confidence by his company for those reasons. We didn't want anyone getting wind of it because there was such a terrific need for it that we were concerned over the fact that

(Testimony of Abraham Grossman.)

competition might pick this up and beat us to the punch.

Q. At that time did you discuss dies with Mr. Kavich? A. Yes.

Q. What was your discussion regarding dies?

A. Only the technical aspects of dies.

Q. Did you discuss the possibility of the die charge being made for the individual dies which were necessary?

A. Only in that certain hollow shapes and certain sized dies were questioned as to what they might cost. But it wasn't questioned whether we pay or not pay, if that is what you meant.

Q. Why wasn't it questioned?

A. Well, this was tacit understanding. All our history has proven that that's the way dies have been made for us, by this specific charge, by formula, because of certain sizes. [57]

Mr. Duque: To which I move, your Honor, that the answer be stricken as not responsive to the question. It is a self-serving statement of the witness.

The Court: Does the motion go to the entire answer?

Mr. Duque: Pardon?

The Court: Is your motion directed to the entire answer?

Mr. Duque: Yes, your Honor.

The Court: The motion is denied.

Q. (By Mr. Mahoney): Mr. Grossman, I show you Plaintiff's Exhibit No. 7 for identification,

(Testimony of Abraham Grossman.)

which is a model of the Panador aluminum-frame sliding door, and I request that you very briefly analyze the manner in which the door functions, the manner in which it is set up in the field, and other pertinent factors relating to the Panador aluminum-sash-and-frame sliding door.

A. I will try to do it very briefly and as clearly as possible.

This is a model of the door, and although the sections are in full size, the model itself, of course, is reduced to a much smaller size.

Now, these are the sash members (indicating). Now, if I can get one of these out——

Would you help me here?

Mr. Mahoney: It might be explained that the frame is normally installed in the building and, of course, is [58] immovable.

The Witness: Now, in one of the sash the weather stripping has a particular tension on the track so that the door will be prevented from rattling. The function of fit with that particular type of weather stripping has to be so constructed from the extrusion itself that it is applied and set in easily without any other problems. Once it is set in and staked into position, and the space between these two pieces of weather stripping is so adjusted in the tolerance of the extrusion that the door operates with complete weather contact of that weather stripping——

The Court: That is done by some other means than the extrusion itself, is it not?

(Testimony of Abraham Grossman.)

The Witness: Yes. But the receptacle for that weather stripping has to be so designed in the extrusion itself so that the normal tolerance, the commercial tolerances in the extrusion are so constructed that if the extrusion comes in with a minus tolerance, this space should be closed to such a degree that when the weather stripping is put in, the door shouldn't be too tight; or, if it is constructed with a tolerance where it is as wide as possible in an open position, it still maintains weather contact with the——

The Court: That unique feature is something wholly apart from the extrusion, isn't it?

The Witness: No. The extrusion is responsible for the [59] success of this particular weather stripping.

The Court: Well, explain that to me. That is what I don't understand.

The Witness: In other words——

The Court: Which is the extrusion?

The Witness: The extrusion is the aluminum.

The Court: That is what I understood. So if you take a piece of aluminum with a valley in it that wide and by adjusting what you put inside it you would get the same result, wouldn't you?

The Witness: No, because what you put inside it is also constant. You see, this material varies, your Honor. It comes to us in all of the allowable tolerances of normal commercial extrusions.

The Court: Well, does that have something to do with the design?

(Testimony of Abraham Grossman.)

The Witness: Yes, specifically, because this is designed so that within those normal tolerances we still get the proper pressure on both sides of the tolerance lines. That will still allow the door to function and operate with the benefit of this weather stripping. Otherwise, it is either going to be operating with such a tight fit that it would make it almost impossible to——

The Court: It would either rattle or bind?

The Witness: That's correct, it would either rattle or [60] bind. And if it rattles it is no good, and if it binds it can't be operated. So those are the specific details of making a door a good one or a bad one.

Now, the same thing holds true on the bottom. We will have the same conditions.

Now, these are just the important aspects of the weather stripping in the door. But the fit of this joint where the rail—you can see it very clearly here. That rail is set between two ribs as it is secured.

Well, in the field any mechanic, even a bad one, can put that door together. And that joint can't possibly look bad, because it is completely covered by that rib in a continuous form on all sides of the door. So we are not relying on skilled labor to put it together. And yet all adjustments can be made without any gaps appearing at the joint. These are the principal features of the door.

By the use of this type of joint, all that needs to be done—this part is just cut off and a part put

(Testimony of Abraham Grossman.)

in here, a tap part with a screw, and anybody can put a sash together in a matter of minutes. In other words, the glazier actually supplies the glass. These fit around the glass, and the door is automatically glazed at that particular time.

So with the ease of construction and the field installation, we felt we really had a very competitive item that met with huge success in the [61] field.

Mr. Mahoney: I now offer Plaintiff's Exhibits Nos. 6 and 7 for identification in evidence.

Mr. Duque: No objection.

The Court: Received in evidence.

(The document referred to, marked Plaintiff's Exhibit No. 6, was received in evidence.)

(The model door referred to, marked Plaintiff's Exhibit No. 7, was received in evidence.)

Q. (By Mr. Mahoney): Mr. Grossman, after you submitted the drawing, Plaintiff's Exhibit No. 6, to Mr. Kavich, what happened after that?

A. Mr. Kavich then took the drawing back to his office, and sometime afterward we received drawings of the extruded parts on separate pieces of paper from Reynolds Metals Company, which I O.K.'d. And from that point on they were sent back and extrusions made.

Mr. Mahoney: Will you mark this for identification.

(The document referred to was marked Plaintiff's Exhibit No. 8 for identification.)

(Testimony of Abraham Grossman.)

Q. (By Mr. Mahoney): I show you Plaintiff's Exhibit No. 8 for identification, in conjunction with Plaintiff's Exhibit No. 6, and ask you to make a comparison of the drawings of Plaintiff's Exhibit No. 8 and Plaintiff's Exhibit No. 6 to determine whether the extrusions, the extruded shapes shown in the drawing, Plaintiff's Exhibit No. 8 for identification, [62] are identical with the drawing, Plaintiff's Exhibit No. 6.

A. The extruded shapes are identical with the exception of one extrusion which I revised very shortly after the initial drawing, after the original drawing was handed to Reynolds. And there are several additional drawings here that came subsequent to the original drawing.

Q. When you say "came," you mean they came from Reynolds?

A. No. I presented the drawing in the same manner to Reynolds.

Q. Now, did Reynolds Metals Company, and more particularly the extrusion division thereof, ever materially vary the configuration of the shapes?

A. No, they are identical, substantially identical, to my original drawings.

Q. Did they ever provide you with design assistance or tell you how to make extrusions so you could make a better aluminum-frame-and-sash sliding door? A. No.

Q. Have you compared, in general, the dimen-

(Testimony of Abraham Grossman.)

sions shown on the drawings in Plaintiff's Exhibit No. 8 for identification with the drawings in Plaintiff's Exhibit No. 6 for identification?

A. Yes.

Q. And are these dimensions substantially the same? [63] A. Yes.

Q. Now, Mr. Grossman, when you received this sheaf of drawings from the Reynolds Metals Company extrusion division, what did you do with them?

A. I perused them for possible errors, which sometimes happens. The draftsmen sometimes will miss a dimension from my original drawings or misunderstand something. And after doing so, after determining that the dimensions were the same as my drawings, I put an O.K. on it and signed it and sent it back to them which is their indication to go ahead with the processing of the dies.

Q. What was the purpose of submitting these drawings, Plaintiff's Exhibit No. 8 for identification, to you?

A. Well, being the conceiver of these various shapes—where by themselves they may be meaningless but yet all together where they function with one another, somebody has to have the authority to O. K. them for that particular purpose. And, knowing my position, these drawings were sent to me for that purpose, and I determined whether they were correct for that purpose. And that was the reason for the O. K.

Q. Now, Mr. Grossman——

(Testimony of Abraham Grossman.)

Mr. Mahoney: Well, I now offer Plaintiff's Exhibit No. 8 in evidence.

The Court: Is there any objection? [64]

Mr. Duque: I would like just a moment, your Honor, if I may, to check them with our file.

The Court: You may.

Mr. Duque: No, we have no objection.

The Court: Received in evidence.

(The document referred to, marked Plaintiff's Exhibit No. 8, was received in evidence.)

Q. (By Mr. Mahoney): Mr. Grossman, on the face of each of the drawings which constitutes a part of Plaintiff's Exhibit No. 8, there is a notation "Revised." Can you tell us the meaning of this notation?

Mr. Duque: I am sorry, Mr. Mahoney. I didn't get part of your question.

Mr. Mahoney: Will the reporter read the question, please.

(Question read.)

Mr. Duque: I am trying to find the notation on the drawing.

Mr. Mahoney: Here it is (indicating).

Mr. Duque: Oh, "Revised." I thought you said "Advised."

The Witness: I have no knowledge as to why it was done or who did. There seems to be an error or some misunderstanding, because there are no revisions from the original we got or from my original

(Testimony of Abraham Grossman.)

drawings. So, as far as I can say, someone just misunderstood and wrote that on the prints that we received from Reynolds. [65]

Q. (By Mr. Mahoney): Mr. Grossman, during your association with either Glide Windows, Inc., or Panaview Door & Window Co., have you ever had brought to your attention, prior to the present litigation and the facts out of which the present litigation arises, the use by Reynolds Metals Company of dies belonging—of dies which were ordered from Reynolds Metals Company in conformity with original drawings presented by you or by your company, or either of those companies, to Reynolds Metals Company?

Mr. Duque: To which question I object on the grounds that it is incompetent, irrelevant, and unintelligible.

Mr. Mahoney: I think counsel has a good point there. I think I will start all over again.

The Court: Very well. You may rephrase it.

Q. (By Mr. Mahoney): So far as your association with Glide Windows, Inc., is concerned, do you know of your own knowledge at any time Reynolds Metal Company used dies which were ordered by Glide Windows, Inc., from Reynolds Metals Company to be manufactured in accordance with drawings presented by you for the manufacture of extrusions for other customers of Reynolds Metals Company?

Mr. Duque: Just a moment, if the court please. I object to the question on the grounds that it is

(Testimony of Abraham Grossman.)

incompetent, irrelevant, and still unintelligible to me; and on the further grounds that it is not the best evidence and calls for a [66] conclusion of this witness.

Mr. Mahoney: Well, your Honor, in the present instance what we are attempting to show here is that at no time in the history of the relatively lengthy relationship between the defendant, as an executive of both corporations, and both corporations themselves with Reynolds Metals, has Reynolds Metals ever asserted the right to use any of the dies, which it has manufactured for the account of either of those corporations, for its own purposes or for the benefit of another customer.

The Court: According to his understanding?

Mr. Mahoney: According to his understanding.

Mr. Duque: This is limited to his own knowledge?

Mr. Mahoney: I said his own knowledge, yes.

The Court: His understanding?

The Witness: No.

Mr. Mahoney: Your Honor, we have a rather technical problem here. We have here two containers. One is a container bearing a label, "Panador aluminum sliding door," and containing the actual extrusions and the components as shipped. And the other is a container which bears the label, "Windsor aluminum sliding door."

The Court: You have photographs of those, do you not, attached to some of the affidavits?

(Testimony of Abraham Grossman.)

Mr. Mahoney: The containers, we do, but not the [67] contents.

The Court: Yes.

Mr. Mahoney: And Mr. Grossman here is most competent to review these extrusions and to point out the similarity between the extrusions sold by Windsor and the extrusions sold by Panaview.

The Court: May it be stipulated that they are substantially identical for the purposes of this case?

Mr. Duque: I haven't seen them, your Honor, but I will be glad to have our Reynolds Metals engineer look at them, and if they are substantially identical we will so stipulate. If they aren't, we will point out the differences.

The Court: If they both came from the same dies, I would assume it could be stipulated that they are substantially identical.

Mr. Mahoney: What we want to demonstrate to your Honor is the fact that when these extrusions were shipped from the parts department of Reynolds Metals Company they were shipping, for all intents and purposes, not naked and raw extrusions such as they shipped to the plaintiff, but they were shipping substantially all of the components, with a few exceptions, of an aluminum-frame-and-sash sliding door, in the same manner as the plaintiff here would ship it, to Windsor.

Will they stipulate to that? [68]

Mr. Duque: We will stipulate to what I just said.

The Court: Perhaps you can compare the con-

(Testimony of Abraham Grossman.)

tents of those two containers and get up a stipulation over the week end.

Mr. Mahoney: That might be a very good idea, your Honor. And then we could avoid burdening the record with 8-foot boxes and avoid burdening your Honor with a time-consuming comparison.

The Court: Very well.

Mr. Mahoney: We will meet, then, well, not over the week end, but perhaps Monday morning, and review the contents of these boxes and perhaps make a list——

Mr. Duque: May I suggest that we meet at a mutually agreeable time rather than fix the moment right now?

Mr. Mahoney: Certainly. That will be fine.

The Court: Very well, gentlemen. Just so you are ready with it by Tuesday morning.

Q. (By Mr. Mahoney): Now, Mr. Grossman, you have previously testified from Plaintiff's Exhibit No. 6, which is already in evidence, that the dimensions and the shapes of the extrusions shown in that drawing originally presented by you to the defendant here and the dimensions of the extrusions shown in Plaintiff's Exhibit No. 8 were substantially identical. A. Yes. [69]

Q. Now, Mr. Grossman, if you, as a manufacturer of aluminum sliding doors consisting largely of aluminum extrusions, were to attempt to make a copy of an aluminum-frame-and-sash sliding door such as the Panador, would this be a simple task?

A. It wouldn't.

(Testimony of Abraham Grossman.)

Mr. Duque: I object on the grounds that it is incompetent, irrelevant, and immaterial; conjectural; and has no bearing on any of the issues in this case, what Mr. Grossman might do as a manufacturer if he were to take down somebody else's doors.

The Court: What is the purpose of it?

Mr. Mahoney: The purpose of this question, your Honor, is to show that it would not be a simple task for anybody to take a structure of the relative complexities that this consists of, as it does, of numerous extrusions, to measure up each extrusion without the knowledge behind it that goes to make up the working assemblage and easily and quickly get into the market in competition with the manufacturer originally manufacturing the device —that this would be a time-consuming, expensive, and laborious procedure.

The Court: You mean to someone starting——

Mr. Mahoney: From scratch.

The Court: I don't think you need any evidence on that. It would be a matter of common knowledge, wouldn't it? [70]

In the first place, someone would have to produce the drawings and then someone would have to produce the dies and then you would have to get in production with it.

Mr. Mahoney: Well, your Honor, if the defendant wishes to stipulate to that. This is a subject——

The Court: Well, even if they refuse to stipulate to it, I would assume it was so.

(Testimony of Abraham Grossman.)

Mr. Mahoney: A subject for judicial notice, then?

The Court: I should think so.

Q. (By Mr. Mahoney): Now, Mr. Grossman, when did you first learn that the Windsor Supply Company or the Windsor Manufacturing Company was manufacturing or selling aluminum-frame sliding doors substantially identical with the Panador aluminum-frame-and-sash sliding door?

A. Sometime in February of this year.

Q. What did you do when you discovered this?

A. We tried to determine if, first of all, it was actually a fact that the materials used were the same materials, or dies. And through careful analysis in our plant and eventually in testing laboratories, getting photo-micrographs of the parts themselves, to prove that the dies, similar to fingerprints for identification, were actually the same, and that the die markings in every way proved that they were the same dies that our material was run from.

Q. And how did you determine this? Did you have a [71] sample of the——

The Court: Does it matter?

Mr. Mahoney: It doesn't matter. It's admitted.

The Court: It's admitted.

Mr. Mahoney: Your witness.

The Court: If he had known they were going to admit it, he wouldn't have needed to determine it, would he?

(Testimony of Abraham Grossman.)

Mr. Mahoney: No. We would have saved a lot of money.

Cross-Examination

By Mr. Duque:

Q. Mr. Grossman, you say that you entered the manufacturing of windows, that business, in 1948?

A. Yes.

Q. What did you do before that?

A. I was in the building field as a contractor, building contractor, building modern homes.

Q. Have you any engineering training or background? A. Architectural.

Q. Architectural. I understand. But engineering? Have you gone to an engineering school?

A. Only what went with the architectural course; no particular course.

Q. Where? A. At USC. [72]

Q. And you graduated as an architect?

A. No, I didn't graduate.

Q. What engineering courses did you take at the University of Southern California?

A. Only what engineering went with the first two years of architectural study.

Q. And what engineering is that, please?

A. Relatively simple engineering, with structure.

Q. Now, you say that the first meeting that you had with anybody connected with Reynolds Metals Company was in the middle of 1948, is that correct?

A. Approximately.

Q. That is when you say you met with Mr.

(Testimony of Abraham Grossman.)

Harry Sargeant? A. Yes.

Q. Did I understand your testimony to be that at that time he was sales manager of the extrusion division of Reynolds Metals Company?

A. I understood it to be that.

Q. And at that time you met with him and Mr. Silvers and Mr. Jerry Reznick?

A. Yes, as far as I can remember. There might have been a Mr. Max Resnick there also, or instead of Jerry Reznick. That is something I don't recall.

Q. You aren't sure whether it was Jerry or whether it was Max? [73] A. That's right.

Q. In any event it was either one of them?

A. Or it could have been both.

Q. You don't recollect?

A. I remember we went as a group.

Q. Pardon?

A. We went as a group. I did not go alone.

Q. And that meeting took place where, Mr. Grossman?

A. That took place in a building that Reynolds' offices were located in, 12th and Beacon Streets, I believe.

Q. Now, at that time you were talking to Reynolds Metals about producing extrusions for a sliding window, were you? A. Yes.

Q. You weren't in the sliding-door business at that time, were you?

A. We had sliding doors ready to go on extrusions, but at that particular time we started with the window.

(Testimony of Abraham Grossman.)

Q. Your first discussion with Mr. Sargeant then related to extruded shapes for windows and not doors? A. Yes.

Q. Is that correct? A. That is correct.

Q. Now, you say that at that time Mr. Sargeant made some statement to you in connection with the use of the dies [74] which would be made?

A. Yes.

Q. Do you have a clear recollection of what Mr. Sargeant said?

A. Yes. This was in the form of a general educational process that Mr. Sargeant was giving us as a group, inasmuch as our experience—we didn't know these things and we had to have these clarified before we did business.

Q. So Mr. Sargeant was giving you an educational dissertation on the subject?

A. That's right.

Q. At that time did Mr. Sargeant have before him any of the acknowledgments or terms and conditions which were sent by Reynolds Metals Company to its customers when they received an order?

A. I don't recall. This was a verbal conversation that I do recall.

Q. Will you tell me again just what Mr. Sargeant told you with regard to the use of the dies, please?

A. Well, not word for word, but words to the effect that—and what brought this into the conversation principally was our particular worry about

(Testimony of Abraham Grossman.)

what protection we would have on an item that we were giving to a company and were strictly at the mercy of that company's confidential relationship with us, what protection we would have for [75] the material we got from those dies. And it was simply put that the dies that we bought and paid for the use of would be strictly for the material, our exclusive use, as far as the material run from them was concerned.

Q. Did Mr. Sargeant ever tell you that you were going to buy and own any these dies?

A. No, he did not.

Q. Did he ever tell you that all that you got was the use of the dies and that the service charge——

A. The exclusive use of the dies. That was very clearly determined before we went further.

Q. And did he tell you that for the use of the dies you were paying a service charge?

A. I don't recall any such definition. All I know is that we paid for the dies but could not take them from the aluminum company. But we had exclusive use of all material run through those dies.

Q. And did he tell you that the dies belonged to you?

A. I don't recall if we went into that. I was only interested, and the rest of my group was only interested, in protection, as far as preventing others from taking the same material and using it in competition with us. And we were made to understand that the material would be exclusively for our use.

(Testimony of Abraham Grossman.)

Q. Were the shapes or the designs or drawings that you [76] had—were they patented?

A. No, they weren't patented at that time.

Q. Was there anything about the drawings or shapes——

Mr. Mahoney: Objection, your Honor. I think there should be more clarification as to what drawings and what shapes are being discussed.

Mr. Duque: Well, I am talking about the drawings and shapes he alleged he submitted after his first conversation with Mr. Sargeant.

The Court: Those would be the drawings of Exhibit 6 and Exhibit 8?

Mr. Mahoney: This points up the difficulty—well, Mr. Duque is in a position to explain it more thoroughly.

Mr. Duque: Well, your Honor, there is——

The Court: Are the drawings in evidence yet?

Mr. Duque: No.

The Court: The drawings are not yet in evidence, that you are speaking of?

Mr. Duque: No. The drawings that I am referring to are the drawings which he apparently submitted here — in evidence, no. They are not in evidence, your Honor. They relate to the ones that the letter of Mr. Yates sent, dated November 19, 1951, which is Exhibit 4, and the answer, which is Exhibit 5.

The Court: Well, where are those drawings? Are they here? [77]

(Testimony of Abraham Grossman.)

Mr. Duque: They aren't in evidence, your Honor, but they are referred to in those two pieces of correspondence, and it is to those drawings that I am now referring.

Mr. Mahoney: Mr. Grossman, could we obtain copies of those drawings from your files?

The Witness: I believe so. They are so old, though.

Mr. Mahoney: Do you desire that we produce copies of those drawings?

Mr. Duque: It would be interesting, yes.

The Witness: We might have some.

The Court: You are referring in your questioning, as I understand it, Mr. Duque, not to Exhibits 6 and 8——

Mr. Duque: No, your Honor.

The Court: ——but to subsequent drawings submitted to the defendant?

Mr. Duque: To previous drawings, your Honor.

The Court: To previous drawings?

Mr. Duque: Yes, the drawings which are referred to in Exhibit 3 and Exhibit 4.

The Court: Do you understand?

The Witness: Yes. If I might add, those were the original drawings that we started business on, and that product is now obsolete and has been for a number of years.

The Court: By "we," you are referring to whom?

(Testimony of Abraham Grossman.)

The Witness: The company. [78]

The Court: Which company?

The Witness: The Glide Window Company.

The Court: I suggest that you specify the company in each instance.

The Witness: I will try to do that.

The Court: Either specify Glide or Panaview, and then we will know to which you are referring.

The Witness: I will try to do that, your Honor. This is the original product that we had, and the Glide Window Company has gone into another product that a patent has been gotten on, and this product that we are now speaking of is obsolete. I might have difficulty in locating those drawings.

The Court: Was there any patent ever applied for, design or otherwise, on any of the drawings?

The Witness: Yes, on all the drawings.

The Court: But no patent ever issued?

The Witness: On that particular one, no, because we dropped that in favor of a more improved window, and we followed through with a patent on that and obtained it.

The Court: There is no patent involved in this suit, as I understand.

Mr. Duque: No, your Honor, there are no patented materials, and I wanted to make sure that I was correct in my understanding that any of these as far back as the Glide [79] drawings and up through the Panador drawings and the doors and windows, there are no patents involved in this litigation.

(Testimony of Abraham Grossman.)

The Court: Is that agreed, Mr. Mahoney?

Mr. Mahoney: So stipulated.

Mr. Duque: Maybe I can approach it in this manner:

Q. Mr. Grossman, when you had your first conversation with Mr. Sargeant and he gave you that educational dissertation on the methods of operation, after that did you submit any drawings to Mr. Sargeant for the purpose of having Reynolds Metals Company produce extrusions?

A. We presented—I don't recall if I presented it personally to Mr. Sargeant, but a representative of Mr. Sargeant, certainly, and—well, yes, we did have these drawings submitted to the Reynolds Metals Company.

Q. At that time, after you submitted the drawings and submitted the order, did you get an acknowledgment? A. Yes.

Q. Now, are the die numbers which are referred to in Plaintiff's Exhibit No. 3, which is the letter from Mr. Yates to you, are they the dies that relate to the drawings which you say were made after the original conversation with Mr. Sargeant?

A. They are.

Q. They are? A. Yes. [80]

Q. Now, referring to this letter—do you have it in front of you, Mr. Grossman?

A. The letter sent to the Glide Window Company?

(Testimony of Abraham Grossman.)

Q. The letter of November 19, 1951?

A. Yes, I do.

Q. I believe in your direct testimony you stated that that letter was a letter asking for your permission or consent to use the dies, which had been made to produce extrusions for Panaview, for some other competitor of yours. Is that what you believe that letter said?

A. My impression—I haven't read this letter for some time.

Q. Would you read it, please, and point out to me the portion of it in which Reynolds Metals Company asks for your consent to use those dies for another customer, or for a competitor, please?

A. That wouldn't be necessary, if I can explain my answer.

Q. Would you mind reading the letter, so that you will be acquainted with it, and then pointing out to me where the consent is?

A. The consent isn't here—the asking for consent to do that. They were asking for consent to do something else. I misunderstood.

Q. So that the letter does not purport to be what you [81] said it was, a letter requesting your consent to use the dies for another customer, is that correct?

A. No. It asks for maintaining the dies and storing the dies. And they want to know if they still should do that or destroy them.

Q. And then, following that, you replied with the next exhibit, which I assume you have in front

(Testimony of Abraham Grossman.)

of you, which is Exhibit No. 4, and in that letter you requested that they continue to store the dies, is that correct? A. Yes.

Q. Now, at the time that you received the acknowledgement which relates to these same dies that are referred to in this letter, did you read the acknowledgement?

A. I don't recall if I did. I probably did.

Q. Were you acquainted with the form of acknowledgement that was used by the Reynolds Metals Company at that time?

A. I believe I was at that time. I don't recall now just the exact details.

Q. Now, will you read paragraph 11 of that acknowledgement which was sent to you in 1951, please, sir? A. 11 or 12?

Q. 12 in that one.

Mr. Mahoney: Objection, your Honor. The document speaks for itself.

Mr. Duque: I am just asking him to read it so he will [82] know what is in it. It is preliminary to another question.

The Witness: "Equipment"——

Mr. Duque: I don't mean to read it out loud. Read it to yourself so that you will know what's in it.

(Witness examines document.)

The Witness: All right. I have read it.

Q. (By Mr. Duque): And that acknowledgement which was sent to you at that time confirmed

(Testimony of Abraham Grossman.)

your understanding that the dies would be used only for your use, is that correct?

A. Yes, it does.

Q. Very well. Now, as other dies were ordered by Glide and Panaview, did you read the acknowledgements that were sent to you?

A. I don't recall if I read every one, but occasionally we discussed this. In our history in relationship with other suppliers it all seemed to be the same, and these seemed to be identical with all the other companies.

Q. In other words, the terms and conditions of the Reynolds Metals Company acknowledgement were, as far as you were concerned, identical to Harvey——

A. As far as meaning was concerned, we feel they were identical.

Q. When you first submitted the drawings to Reynolds Metals Company with regard to the Panador—I am now up to date and we have passed by the Glide era and we are in the [83] Panador era now—when you first submitted Exhibit 6, do I understand that all of these drawings were made by you personally? A. Yes, they were.

Q. And they came from your own mind and were not copied from any other drawing?

A. They absolutely were not.

Q. Have you ever heard of Sweet's catalog?

A. Yes, I have.

Q. Have you ever read it?

A. Thoroughly.

(Testimony of Abraham Grossman.)

Q. Have you looked at extrusions and shapes that are in Sweet's catalog? A. I have.

Q. And, so far as you know, these drawings that you say you produced are not in any way similar to any of the ones that appear in Sweet's catalog?

A. I would say none of these drawings could be superimposed on other extrusions and be in any way matching.

The Court: Gentlemen, these drawings that you refer to, are they in evidence?

Mr. Duque: Yes, your Honor, they are Exhibit 6.

The Court: Let's refer to it by exhibit number.

Mr. Duque: I am sorry. I thought I had, your Honor. I thought when I first started asking him that I identified it [84] by number.

The Court: Do you understand?

The Witness: Yes, your Honor.

Q. (By Mr. Duque): You do have Exhibit No. 6 in front of you? A. Yes.

Q. And you understand that my previous questioning related to Exhibit No. 6?

A. Yes. I believe I answered your question.

Q. But I mean, I want to clarify it because his Honor indicated possibly that you did not have reason to know I was referring to Exhibit 6 all during this line of questioning.

A. It was clear.

Q. I wanted to make sure that you did.

A. It was clear.

Q. Thank you. Now, you say that after this

(Testimony of Abraham Grossman.)

question—and you say that, so far as you were able to ascertain, the two are identical—Reynolds Metals Company made no changes in your original drawings? Is that your testimony?

A. No. There was one part where some changes were made, but Reynolds did not make those changes. I made the changes.

Q. Explain to me, if you will, the process that occurred. As I understand your testimony, you submitted to Reynolds Metals Company Exhibit 6, is that correct? [85] A. Yes.

Q. And then Reynolds Metals Company sent you a set of drawings? A. That's right.

Q. Which are Plaintiff's Exhibit 8, is that right? A. That's correct.

Q. And you have those before you?

A. I did. I don't have them now. I am aware of what they are.

Q. Now, is it your testimony that Plaintiff's Exhibit 6 and Plaintiff's Exhibit 8 are identical?

A. Yes, substantially so. There might be very, very minor differences in the way the dimension was held. But on the over-all part, whichever way the dimension was put, it would still conform to my median dimension.

These drawings, incidentally, if I may go a little further on that, are made for the diemaker. The diemakers evidently worked from these drawings, and they have to be put in a particular form. Otherwise there would be no need to make them. They could use my drawing in its original state. So what-

(Testimony of Abraham Grossman.)

ever nomenclature or method of dimensioning, any changes would be completely minor, and the over-all dimensions would hold true to match what I had given them originally.

Q. In other words, Mr. Grossman, the original drawing that you sent, Plaintiff's Exhibit No. 6, was the drawing [86] which was used by Reynolds Metals Company to make its dies and extrusions, is that right? A. That is correct.

Q. And Reynolds Metals Company did nothing to change it whatsoever? A. No, no.

Q. Thank you.

Now, you say that this Panador that is the subject of this litigation was a very novel door and had very novel features to it; and you explained about the weatherstripping and about that joint down on the left bottom side.

Do you know of any other doors that are identical to that Panador that are on the market today?

A. Only an entrance door that I made. That particular type of joint is used on that entrance door. And this was the first on the market, and it was called an Alumart entrance door. This is also in Sweet's catalog.

Q. Have you ever heard of the Sun Valley sliding door? A. Yes, I have.

Q. How does that differ from the Panador?

A. Considerably.

Q. It does?

A. We are suing them now because of patent infringement. And that's how I know of them.

(Testimony of Abraham Grossman.)

Q. You are suing them because of patent infringement? [87] A. Yes, we are.

Q. Is the Panador patented?

A. Their Panaview door is the exact copy of our Panaview door, and that is patented.

Mr. Mahoney: Your Honor, the witness is confused. He used "Panaview" twice in his answer. And so, to set the record straight, it might be explained that the Panaview Door & Window Co. makes a Panaview door and a Panador, and that it is the Panaview door which is patented and which is the subject of litigation.

Is that clear?

Mr. Duque: It's clear to me.

The Court: Do you accept Mr. Mahoney's statement as a Stipulation?

Mr. Duque: I accept his statement that the Panaview is a patented door. I did not know it before. I didn't know that any of these doors were patented.

Mr. Mahoney: Oh, the Glide door is also patented.

Mr. Duque: I thought he just finished saying that there was no patent involved.

Mr. Mahoney: He was referring to the Glide window, which was specifically what you were discussing.

Perhaps it might be better form to ask the witness what he was referring to.

The Court: What's the difference between a Panaview [88] door and a Panador?

(Testimony of Abraham Grossman.)

The Witness: The Panaview door is a door that is a little more difficult to manufacture, and the extruded shapes are more expensive because of their hollow shapes.

The Court: Is it for the same purpose?

The Witness: In that it's a door, it is the same purpose. But the shapes are much simpler in the Panador, and it is a much more competitive door because of that. There is less aluminum.

The Court: There is a design patent on that?

The Witness: No. We had a patent pending, but because of the patents on our other products we felt that they would cover on this.

The Court: I mean on the Panaview door.

The Witness: We have patents on those, yes.

The Court: On the Panaview door, but not on the Panador which is involved here?

The Witness: No. That is correct.

Q. (By Mr. Duque): Now, to go back to the novel and unique aspects of the Panadore, as I understand your testimony, you say that the Panador has two features that no other door has; one is the joint that you referred to, which makes it easy for anybody who is not a mechanic to put the door together; and the other is the feature with regard to the top runner? [89]

A. No, I didn't say it in that manner, or answer in that manner.

Q. Well, what did you say?

A. What I did was just to point out some of the features and some of the aspects of a door that

(Testimony of Abraham Grossman.)

could go toward making a good or a bad door if they weren't conceived of and carried out properly. I did not say that this was the only door employing weatherstripping of that kind.

As far as the joint is concerned, it is unique in this particular type of door.

Q. By "unique," you mean that no other company——

A. No other sliding door has ever used it.

Q. I see.

A. And that others might try to use some of these features—I have no doubt that they are trying to now. This, of course, is something that we are well aware of and are proceeding to defend our rights in that matter legally.

But as far as the aspects of a sliding door are concerned, many sliding doors have rollers; I would say they all do. There are slide doors that have weatherstripping; I would say most of them do. And that they are made of aluminum extrusions; they are that, also.

But what I was saying is that the chief feature of this door was that the simplicity of construction was to such a simple degree that it allowed us to manufacture this door far [90] under the price of even our Panaview door which, up until the time that this door came into being, was a very competitive door.

Q. What is so unique about the Panador? Would you mind stating again the unique features of the——

(Testimony of Abraham Grossman.)

A. Well, the unique feature of the door is that it is such a good door for the price.

Q. In other words, it is a good door and it's cheap? A. That is right.

Q. And that is the unique feature of it?

A. It certainly is.

The Court: And it is good because of the joint which you described?

The Witness: That is one of the features, the joint, and the fact that the weatherstripping that is put in it, as I tried to explain, is put in in such a way that even the aluminum tolerances on both sides, of the plus or minus, would not destroy the function of that weatherstripping. Whereas, if it were a bad door, or cheap, it would either rattle or be so tight as to be inoperable. Whereas this door works with the same ease as our Panaview door. It actually supplies the same benefits as the Panaview door which is at the higher price. And we have that comment from all over the country from builders who say that it does everything any other expensive door—— [91]

Mr. Duque: Now, Mr. Grossman, would you mind limiting your answers to the questions? The comments of the builders all over the nation, I don't think are quite relevant here.

The Witness: I was just trying to clarify the benefits of this door, as to why I feel that it is different than any other door——

Q. (By Mr. Duque): It has to do (a) with the

(Testimony of Abraham Grossman.)

weatherstripping and (b) with the joint, is that right? A. Those are some of the points, yes.

Q. Well, you said those were the two points. Now, are there other points?

A. Well, the ease of assembly in the field.

Q. Well, that is because of the joint, isn't it?

A. That's only one of the features of the joint. But there are also a number of tolerances that have to be considered. A carpenter who isn't a good mechanic, or any man who isn't a good mechanic—it doesn't have to be a carpenter, necessarily; it could be just a homeowner that wants to put one of these doors in, and many times it is dependent on putting the sliding-door frame in perfectly, and that has to be done, ordinarily—at least up until this door was put in, or put out on the market—because any slight discrepancy in the way that frame was put in would be magnified in the way these large sliding panes of glass would sit on that track. If the door frame was off one-sixteenth of an [92] inch, the sash itself might be off a quarter to three-eighths of an inch in squareness because the mistake would be magnified. But the way this door is constructed, with such tremendous tolerances, it takes into account all of these variations that go with bad workmanship, and that was principally another feature in the success in the field.

Q. And that, you say, is not true of any other sliding door on the market? Is that your testimony?

A. To various degrees other doors have it. But

(Testimony of Abraham Grossman.)

this door is successful principally because it is to a tremendous degree.

Q. Mr. Grossman, is there anything from an engineering or technical point of view that is so unique and so different that it would prevent anybody from taking your Panador, breaking it down, and making an identical copy of it?

A. Yes, a great deal.

Q. What are the unique engineering features?

A. Well, aside from engineering features, but just the features themselves—I will call them just that—anybody can copy anything. And if, in the case of somebody wanting to copy a door, he presented a door or model of that door and had a diemaker make dies identical with the dies that this door showed the sections to be, the sections of the model that he is showing are already imperfect and may be imperfect to the utmost of tolerances. In other words, one part in the [93] door might be to the minus side completely of a tolerance; another part working with that might be completely to the plus side; so that the diemaker, not understanding the intricacies, copying those dies, would in turn have material from the dies he made go to opposite extremes, and, as a result, what we were talking about in the way of functioning with component parts within the extrusions would be so far off that a person would have to experiment for a year or maybe two to determine that he was wrong. It simply can't be copied from the actual item and be right.

(Testimony of Abraham Grossman.)

Q. So it is your contention that this door is so unique and so different and engineeringly so particular that it is impossible for anybody to copy this door and reproduce it within a period of less than two years?

A. I am not referring to this door. I am referring to any door that might be copied.

Q. Well, let's confine your testimony to the questions that I ask you. I am talking about the Panador. That is the one you are suing on, isn't it?

A. Yes. Referring to Panador, I can't qualify as to the time element. I only know that we worked on it for a number of years and went through all of the experimentation required to make it successful. And somebody, not knowing all of these fine points that we gained through our experience, would be bound to go through that same time element to make [94] it successful.

Q. Now, assuming that you went through all of these years of experimentation, and assuming for the purpose of the question that you developed certain unique features and so on and so forth, is it your testimony that this door is so different and so unique from an engineering point of view that it couldn't be copied within less than two years?

A. I didn't say it couldn't be copied—it could be copied within the time it takes to make extrusion dies, for that matter. But what I did contend was that the material run from those dies would, because of the various commercial tolerances allowable, not be as good a door or function properly as

(Testimony of Abraham Grossman.)

the dies made from my own drawings which gave the median lines, median dimensions for the tolerances to revolve about. That would be by hit or miss that that was finally discovered.

Q. Mr. Grossman, when did you first put Panador out on the market for sale to the public?

A. Sometime, I imagine, in the late summer or fall of 1954.

Q. And at that time did you exhibit it at exhibitions and at trade shows?

A. At the time we first sold it?

Q. When you first put it out on the market?

A. I don't recall. We might have, but I don't recall. [95]

Q. Now, when you say that you had a conversation with Mr. Kavich when you turned over to him Exhibit 6, as I understand your testimony, you told him that this was a new product and that you didn't want any of your competitors to know that it was coming out on the market and would he mind not telling any of the salesmen of any other companies. Is that correct?

A. Words to that effect.

Q. That was the substance of your conversation? A. Yes.

Q. You had no conversation with him about the use of dies or anything else? A. No.

Q. Now, with regard to Exhibit 8—do you have that in front of you, sir? A. Yes, I do.

Q. That is the one that has the word "Revised" written across it, is that right? A. Yes.

(Testimony of Abraham Grossman.)

Q. Is that right? A. Yes.

Q. You don't know who wrote that?

A. No. It evidently was someone in our company that wrote that for some unknown reason. But it has nothing to do with the drawing because the drawing is identical with the [96] original drawings that were received from Reynolds. So it couldn't have been received in that way.

Q. In other words, you don't know who wrote the word "Revised" on there?

A. I have no idea.

Q. You don't think it was anybody in your company?

A. I do think it was somebody in our company.

Q. You do? A. Yes, I do.

Q. Not the Reynolds Metals Company?

A. No.

Q. Then you think they wrote it in there by mistake or otherwise, because obviously it couldn't be revised because it is identical?

A. Yes, that is correct.

Q. When you first put out the Panador did you call it the "full light" door?

A. There was a number of doors, and I think one of the names was that.

Q. When you first put it out on the market were you manufacturing it for the W. P. Fuller Company? A. No.

Q. How did you happen to name it the "full light" door?

(Testimony of Abraham Grossman.)

A. I thought it would be a good name.

Q. It had nothing to do with the name "Fuller"? [97]

A. No, that is a coincidence. Later we felt it might be used for Fuller's own name if they so wanted it, but we never sold directly to Fuller.

Q. When you first dreamed up the name "full light," what connection did that have with the door? What did the "full light" mean?

A. "Full light" would mean a full light of glass, where you have a little frame and it allows as full a view as possible. And a full light, in terms of the glazing field, means that as little light is cut off as possible.

Q. Now, except for the conversations that you allegedly had with Mr. Sargeant in 1948 when you were president of Glide Windows, Inc., relating to the manufacture of windows, of extrusions for windows, and except for the conversation which you had with Mr. Kavich when you delivered Plaintiff's Exhibit 6 to him and asked him please not to tell your competitors you were coming out with this door—those are the only two conversations you had with any Reynolds Metals representative, were they not? A. As far as I can recall.

Mr. Duque: Will your Honor bear with me for a moment?

The Court: Yes.

Mr. Duque: No further questions at this time, your Honor.

The Court: Any redirect examination? [98]

Mr. Mahoney: No, your Honor.

The Court: You may step down.

(Witness excused.)

The Court: We will take a five-minute recess.

(Short recess.)

The Court: Call you next witness.

Mr. Mahoney: I now call Mr. Oldenkamp.

The Court: We will continue for only a few minutes.

Mr. Mahoney: This will be a very short witness, your Honor.

The Court: Very well.

CARL OLDENKAMP

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness. My name is Carl Oldenkamp, O-l-d-e-n-k-a-m-p.

The Clerk: C-a-r-l?

The Witness: Yes.

Direct Examination

By Mr. Mahoney:

Q. What is your residence, Mr. Oldenkamp?

A. 4425 Yosemite Way, Los Angeles 65.

Q. What is your occupation? [99]

A. I am president of Windsor Supply, Inc.

(Testimony of Carl Oldenkamp.)

Q. And as president of Windsor Supply, Inc., do you have custody of the business records of Windsor Supply Company, Inc.? A. I do.

Q. And have you brought certain of these records with you to court today?

A. Yes, I have.

Q. In response to a subpoena which was issued to you? A. Yes.

Q. What do these records consist of, Mr. Oldenkamp?

A. They are the purchase orders by Windsor to Reynolds Metals Company; invoices from Reynolds to Windsor Supply; and invoices by Windsor Supply to W. P. Fuller & Company, that have to do with the Windsor sliding door.

Q. I now show you a group of file folders which bear respectively on their tabs the designations "Reynolds Metals, RMC Sliding Door, RMC unpaid, RMC paid," and ask you if the files and the folders were drawn from the records of your company, which are kept in the ordinary and due course of business by your company.

A. That's right.

Mr. Mahoney: Will you kindly mark these as Plaintiff's Exhibit No. 9 for identification?

The Court: Isn't that a matter that can be covered by [100] stipulation, gentlemen?

Mr. Duque: I would think so, your Honor. I don't know what we are trying to prove, but I will be very happy to go over these——

Mr. Mahoney: We will be glad to do that, your

(Testimony of Carl Oldenkamp.)

Honor. These are the records of the purchases of Windsor from Reynolds, and the sales of Windsor to Fuller. And what we would like to do to avoid burdening the record and the court is to obtain a summary, which would constitute a stipulation, of the total purchases from Reynolds by Windsor and the total sales of Windsor to Fuller.

The Court: Could you arrange with Mr. Oldenkamp to make——

Mr. Mahoney: To make such a summary?

The Court: ——some arrangement whereby you could have the schedules made up, or the summary, between now and Tuesday?

Mr. Mahoney: We plan to do that, your Honor. And we are asking that they be marked for identification so that we can retain possession thereof.

The Court: Very well. The files which you have identified in the record will be marked collectively as Exhibit 9 for identification.

Are there five of them?

Mr. Mahoney: Yes, your Honor. [101]

The Court: They will be marked 9-A, -B, -C, -D and -E.

Mr. Mahoney: There are four.

The Court: They will be 9-A, -B, -C and -D.

(The documents referred to were marked Plaintiff's Exhibits Nos. 9-A, 9-B, 9-C and 9-D for identification.)

Mr. Mahoney: And then can we include in that, for purposes of simplicity, the invoices of Windsor

(Testimony of Carl Oldenkamp.)

Supply Company to W. P. Fuller & Co., and just in that serial order, E, F, G, and so forth?

The Court: How many files are there?

Mr. Mahoney: Well, they are quite numerous, so what we could do is just mark them all E and then put them in the box. There are seven groups.

The Court: Seven groups. Those are invoices——

Mr. Mahoney: From Windsor to Fuller.

The Court: They will be marked 10-A, -B, -C, -D, -E and -F.

(Six groups of documents were marked Plaintiff's Exhibits Nos. 10-A, 10-B, 10-C, 10-D, 10-E and 10-F, respectively, for identification.)

The Court: Are there any further questions of Mr. Oldenkamp?

Mr. Duque: Your Honor, may I make this statement at this time? I do not know what the purpose of this testimony or this evidence is, and I reserve my right to object to it [102] on any grounds that I see fit when I find out what the purpose of it is and what the evidence is.

Mr. Mahoney: Well, we have already stated——

The Court: The problem now is whether you gentlemen can compile a summary of what that shows. I assume they want to show sales by Reynolds to Windsor, and then in turn sales by Windsor to Fuller.

Mr. Mahoney: That's correct.

(Testimony of Carl Oldenkamp.)

The Court: And irrespective of the admissibility of it, can you stipulate to a summary on it?

Mr. Duque: As far as I am concerned, if you can prevail upon Mr. Oldenkamp to prepare that summary, that is fine with me.

The Witness: I can do so.

Mr. Mahoney: Well, we would prefer, your Honor, to check that from these records. However, if Mr. Oldenkamp could prepare it, say, by Monday afternoon and bring the records down and we could check it with Mr. Duque—if Monday afternoon is a suitable time for so doing—then we could have it by Tuesday.

The Witness: I would rather have them prepare the summary because that places an additional burden on my staff. And I couldn't get it done by that time.

Mr. Mahoney: We will accept the burden.

The Court: Very well. Are there any further questions [103] of Mr. Oldenkamp?

Do you wish him to return here on Tuesday?

Mr. Mahoney: Did you wish to cross-examine him? We have no further direct examination.

Mr. Duque: I can't cross-examine him. I haven't anything——

The Court: Do you anticipate any cross-examination?

Mr. Duque: I would anticipate none, no, sir. I would assume that the summary that is going to be made correctly reflects the records, and all of the records.

(Testimony of Carl Oldenkamp.)

The Court: All you expect to show are sales by Reynolds to Windsor—well, that you already have.

Mr. Duque: That is fine.

The Court: ——and, in turn, sales from Windsor to Fuller.

Mr. Mahoney: That is correct. That is what we expect to show.

Mr. Duque: I have no objection to the preparation of the summary. I reserve my right to object to the materiality when it is offered.

The Court: Yes. Well, the question now is to reach a stipulation as to the correctness, irrespective of admissibility.

Now, do these invoices show what was sold? Will you need Mr. Oldenkamp? [104]

Mr. Mahoney: No, your Honor. They show actually the quantity shipped, the quantity ordered, the size, the amount paid, the sum total.

I presume, Mr. Oldenkamp, that these invoices are all of the invoices in your possession relating to the transactions between Windsor Supply Company and Reynolds Metals Company, and between Windsor Supply Company and Fuller.

The Court: During the periods indicated.

The Witness: Well, this is all of them.

The Court: For any period?

The Witness: That's right.

The Court: Now, are these records comprising **Exhibits 9 and 10 for identification kept under your** supervision?

The Witness: Yes, sir.

(Testimony of Carl Oldenkamp.)

The Court: And you have already said they are kept in the ordinary course of the business of your company?

The Witness: That's right.

The Court: And it is the ordinary course of business of your company to keep such records as those comprised in Exhibits 9 and 10 for identification?

The Witness: That's right, your Honor.

The Court: Is there anything further of Mr. Oldenkamp?

Mr. Mahoney: Not from the plaintiff.

The Witness: May I ask a question, sir? There are certain files that have to do with the Reynolds Metals [105] Company that are used every day by me in the normal course of my business. Is it necessary that I leave those, as well?

The Court: I understand only the invoices——

Mr. Mahoney: That is what I have.

The Witness: Exhibit 9 is the one I am concerned with.

Mr. Mahoney: The Reynolds Metals Company; there are various orders and correspondence relating to orders, and the financial statements relating to them.

We will give them back to you on Tuesday. Would one day handicap you?

The Witness: That would be all right, then, if I can get them Tuesday.

Mr. Duque: Are you going to use the correspondence file?

(Testimony of Carl Oldenkamp.)

Mr. Mahoney: We haven't seen these. We have just subpoenaed this witness. We will go through it.

Mr. Duque: Well, if anybody is going to go through correspondence files, might I be included?

Mr. Mahoney: You are definitely included. We want you in the party.

The Court: Very well.

Mr. Oldenkamp, I think you better come back Tuesday morning at 10:00 o'clock, and we will attempt to make it very brief at that time. You are excused until then.

(Witness temporarily excused.)

The Court: The trial will be recessed until 10:00 [106] o'clock Tuesday morning.

And, Mr. Mahoney, if you will make known to the defendant anything of record that you want, I expect the defendant not to put you to the proof, because we haven't had a pretrial hearing in this matter, and see if you and Mr. Duque can't reach stipulations on it.

Mr. Duque: We have stipulated to some facts, your Honor, and I have all the records here. If Mr. Mahoney will tell us what he wants——

Mr. Mahoney: Well, we have already issued subpoenas to the various employees of the defendant.

The Court: There is no need of going through all that if Mr. Duque is willing to stipulate.

Mr. Mahoney: Well, he preferred that we subpoena them because——

The Court: Well, they are here now.

Mr. Duque: I preferred that you either subpoena them or you give me a list of them. I wanted to know what I was supposed to produce.

Mr. Mahoney: As long as they are here, this issue is through.

The Court: Very well. You gentlemen get together and stipulate. I don't see any real issue of fact here between you, any broad issues of fact here between you. There may be something on this issue of fiduciary relationship or some of [107] the oral conversations. But everything else is of record, isn't it?

Mr. Mahoney: A large percentage, your Honor.

The Court: Except some conversations, and that is all you can have any issue about, it seems to me. The rest of it, you had just as well stipulate to and save everyone's time.

Mr. Mahoney: Yes, your Honor. We will be happy to stipulate to anything we can.

The Court: Very well. The trial will be recessed until 10:00 o'clock Tuesday morning, November 22nd.

Court will adjourn.

(Whereupon, an adjournment was taken until Tuesday, November 22, 1955, at 10:00 a.m.) [108]

Tuesday, November 22, 1955—10:00 A.M.

The Clerk: Case No. 18469, Panaview Door & Window Co. v. Reynolds Metals Company.

Mr. Duque: Ready for the defendant.

Mr. Mahoney: Ready for the plaintiff.

The Court: You may proceed, gentlemen.

Mr. Mahoney: Yesterday, your Honor, in accordance with your Honor's requirements, there was brought to the Court an accountant who went over the invoices of Windsor Supply Company and who arrived at a figure which has been shown to counsel for the defendant. And the total figure on the document shown here is $155,624.97. And this figure, counsel for the defendant will stipulate to as being approximately correct.

Is that correct, Mr. Duque? Is that a correct statement?

Mr. Duque: Yes, your Honor. I will stipulate to the figure being approximately correct, subject to checking by our accountant. But they inform me that it sounds as though it were approximately right.

The Court: Will you stipulate that it is correct, subject to check?

Mr. Duque: Yes, your Honor.

The Court: And it represents what?

Mr. Mahoney: It represents the sum total of the [111] Reynolds invoices as found in the files of Windsor Supply Company.

The Court: That means purchases by Windsor from Reynolds?

Mr. Mahoney: That is correct.

Mr. Duque: As I indicated on Friday, your Honor, I stipulate only to the correctness of the figures subject to further checking. I do not stipulate as to its admissibility.

The Court: Does your stipulation cover what the purchases are?

Mr. Duque: Sir?

The Court: Or, rather, what the purchases were?

Mr. Mahoney: Your Honor, we have some difficulty there because, going through the file of the Windsor Supply Company, we find it was their custom and practice to order this product in the form of doors, so many doors; and these orders of the Windsor Supply Company so read.

There are various documents in the record, including invoices from Reynolds which show that they broke up these doors into component parts and that these component parts, by agreement, would be shipped in boxes wherein one group of identical component parts was contained; but that when the invoice was presented, in many instances it was presented in terms of total number of doors in compliance with the order from Windsor so that there could be a matching of the order and invoice.

Mr. Duque: Well, your Honor, to counsel's statement I am [112] not in agreement, and I think the matter could be cleared up very promptly if Mr. Oldenkamp could take the stand for about three minutes and explain to the Court what the orders mean and what was received by Windsor from Reynolds.

The Court: Very well.

Then it is stipulated, as I understand it, that the purchases by Windsor from Reynolds aggregated a dollar value of $155,624.97, subject to checking.

During what period was this?

Mr. Mahoney: This was in the entire period to date of the relationship of Windsor Supply Company——

The Court: From when, then?

Mr. Mahoney: That period extends—the negotiations started in September, and there were two oral orders——

Mr. Duque: In 1954.

Mr. Mahoney: September, 1954.

The Court: September, 1954, to date?

Mr. Mahoney: To date.

The Court: And open is the question of what was purchased, is that it?

Mr. Mahoney: Yes, your Honor.

The Court: But this much has been stipulated, as I understand it.

Mr. Duque: Yes, your Honor.

The Court: Very well. You may recall Mr. Oldenkamp. [113]

Mr. Mahoney: Mr. Oldenkamp, will you take the stand, please?

Mr. Duque: Your Honor, I wish to make it clear again that I don't know what counsel proposes to do with this figure, but I wish to make it clear again that I am not stipulating to its admissibility as evidence in this trial at this time.

The Court: I understand. You merely made the stipulation, but you object to the receipt of it in evidence?

Mr. Duque: Yes, your Honor.

CARL OLDENKAMP

recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified further as follows:

Mr. Mahoney: Will you please mark this for identification.

(The document referred to was marked Plaintiff's Exhibit No. 11 for identification.)

Direct Examination

By Mr. Mahoney:

Q. Mr. Oldenkamp, I now show you a purchase order of Windsor Manufacturing, Inc., which I have had marked as Plaintiff's Exhibit No. 11 for identification, and which bears the number 1691 and is directed to the Reynolds Metals Company and is ordered to be shipped to the Windsor Supply, [114] Inc. The order bears the date of March 25, 1955, and requests the delivery date of July, 1955.

Mr. Duque: That is the same one I saw yesterday?

Mr. Mahoney: Yes.

Q. In that order, Mr. Oldenkamp, there is reference made to 15,000 sets of sliding doors, KD sliding doors, is that correct?

A. Well, the order reads, "1,500 sets Windsor KD Sliding Door fabricated parts as follows:"——

Q. What does the term "KD" mean, Mr. Oldenkamp? A. Knocked-down.

(Testimony of Carl Oldenkamp.)

Q. And could you give a slight further explanation of "knocked-down" as it is used in the phrase when referring to sliding doors of the character under consideration here?

The Court: It means parts not assembled, doesn't it?

Q. (By Mr. Mahoney): Mr. Oldenkamp, when you made out a purchase order, was such purchase order made out under your supervision?

A. That's right.

Q. How did you determine the number of doors or sets of parts which it would be necessary for you to order?

A. From orders on hand; projected sales.

Q. And did you determine this from the numbers of orders for doors which were in your plant and which you considered would be necessary for shipment in the period for [115] which the order was to cover?

A. Not for orders on hand alone.

Q. Not for orders on hand alone? A. No.

Q. But for projected orders and potential sales which you considered you would make?

A. That's right.

Q. Now, when you made an order like this, did you contemplate receiving a complete shipment of all of the extruded parts necessary to the total number of sets which you ordered?

A. Well, those extruded parts from Reynolds, yes.

Q. And, in the prior practice, when you received

(Testimony of Carl Oldenkamp.)

these parts were they cut to size? A. Yes.

Q. And when you wanted to assemble a package for shipment to a customer, what was your practice? Would you take just one, two stiles, and one, two jambs, and the like, and just take them out of their respective boxes; and in some instances, perhaps, add rubber bumpers and, perhaps, weatherstripping, and move them into another box?

A. There was considerable work performed on those before we packaged them, yes.

Q. What was the considerable work performed?

A. Installation of weather seal; the tapping of end [116] rails; the installation of wheel carriers; the installation of wheels in the wheel carriers; the assembly of the bumpers; the attaching of the latch and the keeper; and in some instances installation holes that had to be drilled.

Q. Now, how much time and expense did these various installations take?

A. Well, it would have to be only a guess on my part at this time without going into considerable cost development. I don't have the cost figures here.

Q. Mr. Oldenkamp, is it not true that on many of the orders shipped to you by Reynolds Metals Company the frame sills had the dust stop riveted to the sill? A. Never.

Q. Did the frame heads ever have the dust stop riveted to the head? A. Never.

Q. Was there ever an installation of rubber bumpers attached to jambs with spacers?

A. Never.

(Testimony of Carl Oldenkamp.)

Q. Did they ever install in the bottom rails the corner inserts, the wheel carriers, and the like?

A. Never.

Q. Or did they ever attach the keeper to the right-hand interlocking stile? A. No. [117]

Mr. Mahoney: Will you please mark this for identification?

(The document referred to was marked Plaintiff's Exhibit No. 12 for identification.)

Q. (By Mr. Mahoney): I now show you Plaintiff's Exhibit No. 12 for identification, which is an order form bearing the number 1539, and having a paper label, "Windsor Supply, Inc.," pasted over the top portion thereof.

Now, on that order, Mr. Oldenkamp, how many sets of KD sliding doors were ordered?

A. "1,000 Windsor KD Sliding Door Fabricated Parts with the following subassemblies performed by Reynolds Metals Company: * * *"

Q. What subassemblies were to be performed by that order?

A. "Frame Sill: dust stop riveted to sill.

"Frame Heads: dust stop riveted to head.

"Frame Jambs: rubber bumpers attached to jambs with spacers, plates, screws and nuts.

"Bottom Rails: corner inserts, wheel carriers, wheels, axles, and pins to be inserted into the end.

"RH Interlocking Stile: keeper riveted to Stile.

"LH Interlocking Stile: latch attached to Stile with two screws."

(Testimony of Carl Oldenkamp.)

And then the other here, the finish and packing. [118]

Q. Now, was that order filled by the Reynolds Metals Company? A. Not in this instance.

Q. What happened to that order?

A. They didn't fill it in the manner that was asked for.

Q. How was it filled?

A. It was filled by cut extrusions.

Q. Can you then review briefly how the cut extrusions would come into the plant of the Windsor Supply Company?

A. Well, the changes to the purchase order dated April 5th gave the component parts of the required units, and there was another change dated April 21st. And it also states the component parts as far as the cut extrusions are concerned.

Q. But is it not true that where you ordered a certain number of sets of KD parts for a certain number of doors, that you received all of the extrusions cut to size, with millwork and various punching operations performed thereupon——

A. That's right.

Q. ——and these parts were shipped to you in boxes containing a number of identical parts? Is that correct?

A. That's right. Well, actually, for the record, they weren't in boxes. They were strapped together.

Q. They were strapped together. And then, when you wanted to make up a package for a sliding door, you would [119] merely take from the

(Testimony of Carl Oldenkamp.)

respective supplies of the parts the required number of extrusions, install the bumpers and install the weatherstripping and install the latch keeper and the latch, put it in another box and ship it out; is that correct?

A. Well, it's not quite as easy as it sounds, the way you make it now sound. It was necessary to secure all of this additional material and then assemble and install it in a carton and then label and ship.

Q. In other words, what you added to the extrusions were just the smaller components such as the rubber bumpers, the weatherstripping and the latches and things of that nature?

A. That's right.

Q. But the extrusions, as they came from the Reynolds plant, were substantially in the shape where, with these few additions, you could put them in a container and ship them to a customer. Is that correct? A. That's right.

Q. And when you put in an order for a thousand sets of parts for a sliding door, you expected to get enough extrusions substantially prepared for use to ship out a thousand containers containing parts for a thousand sliding doors, is that correct? A. That's right.

Mr. Mahoney: Now, your Honor, the plaintiff here [120] hesitates to burden the record with these numerous orders and invoices. The problem here which confronts the plaintiff is that we have these

(Testimony of Carl Oldenkamp.)

various invoices which specifically set forth the number of doors which are ordered, and we have also invoices of the Reynolds Metals Company totaling the number of doors which have been invoiced. And it has been our point here that the Windsor Supply Company ordered the doors in substantially the same manner they would have ordered them from the plaintiff, and that Reynolds Metals Company supplied the extrusions, cut and prepared to a large degree, to the Windsor Supply Company, and all the Windsor Supply Company was to do, in the language of the trade, was to add the findings to the extrusions, and the doors were ready to ship.

Now, the issue here—and the difference between counsel for plaintiff and counsel for the defendant lies in the fact that defendant refused to consider the possibility of a stipulation that doors were ordered by Windsor, and that in response thereto there appears on the invoices of the Reynolds Metals Company such statements as "1,000 doors, 14,021 pieces."

We think these invoices and orders clearly show doors or sets of door parts requested, sets of door parts delivered, and we would be willing to stipulate to that and to the total estimated number from the invoices without burdening the record with each invoice.

Mr. Duque: Your Honor, I have not refused to stipulate [121] to anything that is a fact. I refuse to stipulate to innuendoes and inferences which

(Testimony of Carl Oldenkamp.)

counsel attempts to put in the mouth of the witness and which he attempts to prove by these documents.

He says that because an invoice or order from Windsor Supply Company to Reynolds Metals Company calls for the components of 1500 doors, that that means that Reynolds Metals Company was supplying to Windsor Supply Company completed, packaged doors, and therefore we were in competition with Panaview by selling packaged, completed doors to its competitor, Windsor Supply. That is not the fact, your Honor.

If your Honor will look at these invoices which have been marked for identification, you will see that they call for the component parts of the doors. You have heard Mr. Oldenkamp's testimony that they never received any completed doors from the Reynolds Metals Company. They received in bulk milled component extruded parts for doors, which had been punched. They then went ahead, assembled the doors, packaged them, and sold them to the market.

So I can't stipulate that Reynolds Metals Company sold doors to Windsor because it is simply not the fact. They sold component extruded parts of the doors, which were assembled by Windsor and sold to the public, and packaged as a Windsor door.

Mr. Mahoney: Well, your Honor, I think the line of [122] questioning of the witness has been quite clear that we have attempted to bring out that there were a few additions to the major components of the doors shipped by Reynolds to Wind-

(Testimony of Carl Oldenkamp.)

sor; and we have not attempted in any way to twist the facts. When we say it says on a Reynolds invoice "1,000 doors," we are reading what is printed there.

The Court: But the order is for a thousand door parts, parts for a thousand doors.

Mr. Mahoney: Yes. But what our contention is, if your Honor please, is that these are the major component parts and the Windsor Supply Company merely added rubber bumpers, weatherstripping, and locks and latches, which constitute a very small part of the over-all cost of the door, and then shipped them out.

We are not trying to say that the Reynolds Metals Company actually packaged the complete door down to the bumper in any instance. We are just trying to say what is the truth and what is the fact here. And we certainly do not intend to deceive the Court by innuendo or by any other manner.

We will be happy to stipulate with counsel that orders for so many sets of component parts of sliding doors were transmitted by Windsor to Reynolds, and that orders for so many sets of component parts of sliding doors were shipped in turn and billed to Windsor by Reynolds; using exactly that language. [123]

Mr. Duque: Your Honor, I have no objection to Mr. Oldenkamp testifying to, or to stipulating to whatever figure he gives us as to the number of extruded, milled aluminum shapes Reynolds Metals Company sold to Windsor Supply Company. What-

(Testimony of Carl Oldenkamp.)

ever their books and records show, which we can verify with ours, I am perfectly willing to stipulate to.

The only thing, your Honor—I hope I make myself clear—I can't stipulate that Reynolds Metals sold doors to Windsor because that is not the fact.

The Court: How many of these knocked-down door parts did you buy from Reynolds Metals Company?

The Witness: There was a tabulation made yesterday, and I didn't see the total. All I saw was the scratch sheet that showed the number of doors that were involved.

Mr. Mahoney: The total—and this is an approximate total—number of sets of doors which were ordered was 5,712. And there were shipped 4,929.

And there is an indication that there was also shipped an additional 364, which would bring the total well over 5,000.

The Court: Well, are you willing to stipulate that Windsor purchased from Reynolds the parts which when assembled would approximate 5,000 completed doors?

Mr. Duque: I can't stipulate to that, your Honor. I can stipulate that Reynolds shipped to Windsor milled [124] extruded shapes in bulk which, when put together with other component parts which were purchased from other people and which they packaged, made up approximately 5,000 doors.

(Testimony of Carl Oldenkamp.)

The Court: Well, perhaps Mr. Oldenkamp can——

What parts of the doors did you not purchase from Reynolds? Can you tell us that?

The Witness: Cartons, glazing vinyl, weather-seal, bumpers, spacers, screws, latches, keepers. There were various other sundry supplies that don't come to my mind at this time.

The Court: Can someone tell us, so we can have a stipulation on it? The witness aparently can't name all the things that were not purchased from Reynolds.

Mr. Mahoney: Well, Mr. Grossman would probably be qualified to——

The Witness: Well, you could add the carton ends and the staples and the sealing tape.

The Court: I am talking about what goes into the door, not what goes into the package.

Can you say, "We purchased all the component parts to make a completed door from Reynolds, except as follows"——

The Witness: All right. Dust stop for the head. Dust stop for the sill. The metal-back weather seal to the top rails. The vinyl-back weather seal for the bottom rails and the jambs. And then wheels, axles, corner screws, installation [125] screws, safety bumpers, safety bumper spacer, back-up plates, the screw for the safety bumper, the nut for the safety bumper, the jamb bumper, the jamb bumper screw, the adhesive for the dust stops.

Did I include in there the glazing vinyl?

(Testimony of Carl Oldenkamp.)

The Court: As I recall, you did. If you didn't, it is included, is it?

The Witness: Yes. The latch and the latch keeper; the latch screws and the keeper screw.

I think that covers it.

The Court: Now, except for the parts that Mr. Oldenkamp mentioned in this last answer, is it stipulated that from September, 1954, to date the Windsor Company has purchased from the Reynolds Company, and the Reynolds Company has supplied the Windsor Company with component parts for approximately 5,000 doors?

Mr. Mahoney: Yes, your Honor.

The Court: So stipulated by the defendant?

Mr. Duque: So stipulated, your Honor.

The Court: Very well.

Mr. Duque: I still have an opportunity to cross-examine the witness on the operations, do I not? I mean, by stipulating to that, I——

The Court: Yes. I assume we are only obviating the necessity of going through each one of these orders and [126] invoices.

Mr. Duque: Thank you.

Would you bear with us, your Honor, for a moment?

The Court: Yes.

Q. (By Mr. Mahoney): Mr. Oldenkamp, did you ever receive any incomplete shipments of component parts of sliding doors from Reynolds?

A. Yes.

(Testimony of Carl Oldenkamp.)

Q. Now, if you received such an incomplete shipment, was it possible to ship out the total number of doors which you contemplated, or did you have to wait until you got the remainder of the shipment?

Mr. Duque: To which question I object, your Honor. It is incomplete, irrelevant, and has no materiality that I can see with regard to this lawsuit.

Mr. Mahoney: Your Honor, here we are trying to show that the essence and essentials of the sliding doors lay in what Reynolds Metals supplied.

The Court: Well, I'd assume from what's been testified that a part of something won't make all of it, and that, therefore, until all of it is there, the completed product isn't there.

Mr. Mahoney: Well, then, your Honor will take it as a matter of judicial notice that Reynolds Metals Company was supplying essential components of the sliding door, which [127] lacking, the door could not be placed in a carton and shipped to a customer.

The Court: That would be correct, would it not, Mr. Oldenkamp?

The Witness: That's right.

The Court: The witness so states.

Q. (By Mr. Mahoney): Now, Mr. Oldenkamp, can you tell us what the relationship between Windsor Manufacturing and Windsor Supply Company was and is?

A. They are two separate corporations.

Q. Now, I notice that the orders here began

(Testimony of Carl Oldenkamp.)

with "Windsor Manufacturing Company," and then there were little labels pasted on the orders, bearing the title "Windsor Supply, Inc."

A. That's right.

Q. Now, can you explain that relationship or that changeover?

A. Well, the controlling interest in both corporations is owned by one individual.

Q. Who is that individual?

A. C. A. McLin.

Q. And in your relationship as Windsor Supply, Inc., with Reynolds you merely continued in the footsteps of Windsor Manufacturing Company, is that correct? A. No. [128]

Q. What did you do?

A. The basis for operation, to my knowledge, Windsor Manufacturing was strictly a sales organization. They never made anything. Windsor Supply is in the assembly or manufacturing operations. And when the sales organization ceased operations, because of the similarity in the names and in the forms that Windsor Manufacturing copied from Windsor Supply, we continued to use their forms by the use of labels.

Q. And did Windsor Supply sell to customers which were previously handled by Windsor Manufacturing?

A. Well, you can reverse that. Windsor Supply was in existence long before Windsor Manufacturing, and when Windsor Manufacturing was set up as a sales organization they took Windsor Sup-

(Testimony of Carl Oldenkamp.)

ply customers. And then, when they ceased operations, the Windsor Supply Company continued selling those customers.

Q. There was a direct change between the companies, the two companies, is that correct?

A. There was an agreement between the two companies.

Q. And were both corporations wholly owned by Mr. McLin? A. Not wholly owned.

Q. But he was the dominating owner——

A. Influence.

Q. ——of both corporations? [129]

A. That's right.

Mr. Mahoney: Will you please mark this for identification as Plaintiff's Exhibit No. 13?

(The document referred to was marked Plaintiff's Exhibit No. 13 for identification.)

Q. (By Mr. Mahoney): Mr. Oldenkamp, I show you a letter, Plaintiff's Exhibit No. 13 for identification, addressed to the Reynolds Metals Company on September 29, 1954, to the attention of Mr. Harry Sargent, by M. C. Plumley, president.

Mr. Duque: May I see it, please?

Mr. Mahoney: Yes. I am sorry.

Q. I direct your attention to the bill of "Materials-Specifications-Anticipated Requirements" appended to that letter as a part thereof; and I particularly direct your attention to the heading, "Windsor Supply, Inc.," and ask you if there is an indication under that heading that a sliding door

(Testimony of Carl Oldenkamp.)

had been supplied to Reynolds Metals Company by Windsor Supply, Inc.

A. Well, in order to clarify the situation, I was not an officer of the organization at that time, and the arrangements entered into between Windsor Supply and Reynolds Metals—all I can determine is from the record. This states that Windsor Supply and Duratile of the West had certain aluminum requirements, and they were at that time attempting to negotiate those requirements. And in those requirements Windsor [130] Supply had:

"A. De Luxe Sliding Door materials:

"A sample door has been delivered to you in order that you may ascertain extrusion and fabrication requirements.

"Anticipated monthly requirements: 1,000 units 6'10"x6'10".

"B. Standard Sliding Door materials:

"2,500 units 6'10"x6'10".

"C. Sliding Window materials:

"A sample window has been delivered to you in order that you may ascertain extrusion and fabrication requirements.

"Anticipated monthly unit requirements: 2,000 units 3'0"x3'0".

"Quotations Requested—Windsor Supply, Inc., A, B, & C, above:

"(a) Raw materials.

"(b) Fabricated doors and windows"——

And then it goes on to other manufactured items like shower doors, tub enclosures, and so on.

(Testimony of Carl Oldenkamp.)

Mr. Mahoney: I now offer Plaintiff's Exhibits Nos. 11, 12, and 13 for identification in evidence.

Mr. Duque: To which I object, your Honor, on the grounds that they are incompetent, irrelevant, and immaterial, tend [131] to prove no issues in this case. They are self-serving and hearsay insofar as this defendant is concerned.

The Court: What is the purpose of the offer?

Mr. Mahoney: The purpose of the offer, your Honor——

The Court: I take it the offer also includes the stipulations made as to the dealings between Windsor and Reynolds.

Mr. Mahoney: That is correct, your Honor.

The purpose of the offer here is to show that, in breach of its covenant, implied covenant of good faith, as part of the agreement which constituted a part of the acknowledgment relating to the order for the dies, and in direct sales competition with the plaintiff here, Reynolds Metals Company, for its own profit and in complete disregard of its position of trust and confidence——

The Court: I didn't ask for argument. I just asked for a mere statement of purpose. What issue in the case is this relevant to?

Mr. Mahoney: It relates to the contract issue to the breach-of-confidential-relationship issue and to the unfair-competition issue.

It relates to the contract issue by the breach of the implied covenant of good faith.

(Testimony of Carl Oldenkamp.)

It relates to the breach-of-confidential-relationship issue because, by the use of the very product of what was given to the defendant, they were enabled to perform this act. [132]

And it relates to the unfair-Competition issue because they actually entered into the sale of these component parts of sliding doors in direct competition with the plaintiff.

The Court: The objection will be overruled. The documents and the stipulation will be received in evidence for the purpose of showing the dealings between Reynolds and Windsor.

(The documents referred to, marked Plaintiff's Exhibits Nos. 11, 12, and 13, were received in evidence.)

PLAINTIFF'S EXHIBIT No. 11

Purchase Order

Windsor Manufacturing, Inc.
906 East Green Street
RYan 1-6964 SYcamore 5-3256
Pasadena 1, California

No. 1691

To: Reynolds Metals Company, 601 South Ardmore, Los Angeles, California.

Ship to: Windsor Supply, Inc., 4532 San Fernando Rd., Glendale 4, California.

(Testimony of Carl Oldenkamp.)

Req. No. .....
F.O.B. Shipping Point Std.
Acct. or Job No.: Sliding Doors.
Ship Via: Truck.
Terms: Net 30 days.
Date: March 25, 1955.
Delivery Date Required: July, 1955.

Quantity	Description
	1,500 Sets Windsor KD Sliding Door fabricated parts as follows:
1	F2()-1 Frame Head.
1	F2()-2 Frame Sill.
2	F26-3 Frame Jambs.
2	F26-5 Strike Stile.
1	F26-6 Keeper Stile.
1	F26-7 Latch Stile.
2	F2()-8 Bottom Rail.
2	F2()-9 Top Rail.
4	F26-10 Wheel Carrier.
As Required	F26-12 Meeting Stile.
	Specific quantities of each of the above component parts will be furnished by July 1, 1955.

Conditions: Prices set forth include all charges for Seller's packing and crating supplied for protection in shipment and storage. All materials or articles ordered will be subject to final inspection and approval at destination.

(Testimony of Carl Oldenkamp.)

Notification: If any of the terms or conditions indicated, including delivery requirements, cannot be met for any reason, please notify us immediately.

Identification: Show our purchase order number on all packages, packing lists, invoices, bills of lading, and other documents.

Packing Lists: Send packing list with each shipment, listing the contents of each package in detail.

Invoice in 2 copies. Resale: Yes.

Resale Permit No.: AG39141. Confirming:....

WINDSOR SUPPLY, INC.,

/s/ C. OLDENKAMP,
Authorized Signature.

Received in evidence November 22, 1955.

PLAINTIFF'S EXHIBIT No. 12

Purchase Order

Windsor Supply, Inc.
4424 San Fernando Road
Glendale 4, California
Telephone CHapman 5-1013

No. 1539

(Testimony of Carl Oldenkamp.)

To: Reynolds Metals Company, 601 South Ardmore, Los Angeles 5, California.

Ship to: Windsor Supply, Inc., 4532 San Fernando Road, Glendale 4, California.

Req. No.: .....
F.O.B.: Shipping Point Standard.
Acct. or Job No.: Sliding Doors.
Ship Via: Truck.
Terms: Net 30 days.
Date: February 1, 1955.
Delivery Date Required: April 25, 1955.

Quantity	Description
Item No. 1	1000 Windsor KD Sliding Door Fabricated Parts with the following sub-assemblies performed by Reynolds Metals Company:
	Frame Sill: dust stop riveted to sill.
	Frame Heads: dust stop riveted to head.
	Frame Jambs: rubber bumpers attached to jambs with spacers, plates, screws and nuts.
	Bottom Rails: corner inserts, wheel carriers, wheels, axles, and pins to be inserted into the end.
	RH Interlocking Stile: keeper riveted to Stile.
	LH Interlocking Stile: latch attached to Stile with two screws.

(Testimony of Carl Oldenkamp.)

Finish: Standard mill finish for extruded shapes.

Packing: Bulk packed.

(Specific sizes for the above units will be furnished in writing or by telephone by April 1, 1955.)

Conditions: Prices set forth include all charges for Seller's packing and crating supplied for protection in shipment and storage. All materials or articles ordered will be subject to final inspection and approval at destination.

Notification: If any of the terms or conditions indicated, including delivery requirements, cannot be met for any reason, please notify us immediately.

Identification: Show our purchase order number on all packages, packing lists, invoices, bills of lading, and other documents.

Packing Lists: Send packing list with each shipment, listing the contents of each package in detail.

Invoice in 2 copies. Resale: Yes.

Resale Permit No: ..... Confirming:....

/s/ C. OLDENKAMP,
Authorized Signature.

Received in evidence November 22, 1955.

(Testimony of Carl Oldenkamp.)

PLAINTIFF'S EXHIBIT No. 13

September 29, 1954.

Reynolds Metals Company,
601 South Ardmore,
Los Angeles, California.

Attention: Mr. Harry Sargent.

Gentlemen:

It has been proposed that Windsor Supply, Inc., and Duratile of the West, two California corporations enjoying common ownership, investigate the possibility of entering a contractual agreement with Reynolds Metals Company to the end that these two organizations purchase from Reynolds Metals Company at least 75% of the materials required by them and specified under such agreement.

It is the purpose of this presentation to inform you of the materials needed, specifications therefor, and anticipated monthly requirements of Windsor Supply, Inc., and Duratile of the West in order that you may quote to us your prices on such materials both in raw form and at various stages of processing. Such a listing is enclosed herewith.

It is our understanding that entry into such a contractual relationship would afford our organizations, in addition to favorable price quotations, a certain priority insofar as deliveries upon our orders are concerned. It is requested that these priority ad-

(Testimony of Carl Oldenkamp.)

Plaintiff's Exhibit No. 13—(Continued):

vantages be the subject of your comment at the time that quotations herein requested are transmitted by you to us. Also desired is information concerning the method of meeting die costs and freight charges under such a contractual arrangement.

Of special concern to us is the early production of sliding doors and windows and for this reason it is requested that you indicate the earliest possible date at which delivery can be made on extrusions and fabricated units of this type.

I will anticipate your early response to the requests herein contained with the hope that a mutually agreeable contractual relationship may be entered by our respective organizations.

Yours very truly,

M. C. PLUMLEY,
President.

MCP:ep
Enc.

Materials—Specifications—
Anticipated Requirements

Duratile of the West:

A. Aluminum Coil Stock:

Specifications: .019 3-SH-14 Alodized.
Anticipated monthly requirements:
45,000 lbs. 5¼" wide.
15,000 lbs. 10¼" wide.

(Testimony of Carl Oldenkamp.)

Plaintiff's Exhibit No. 13—(Continued):

Quotations Requested:

(a) Raw material.

(b) Raw material blanked.

(1) Sizes required: 5x5, 5/8x5, 2 1/2x5, 5x10, 2 1/2x10.

(c) Finished tile—Synthetic Acid Resisting Baked Enamel Finish.

Windsor Supply, Inc.:

A. Deluxe Sliding Door materials:

A sample door has been delivered to you in order that you may ascertain extrusion and fabrication requirements.

Anticipated monthly requirements:

1000 units 6'0"x6'10".

B. Standard Sliding Door materials:

2500 units 6'0"x6'10".

C. Sliding Window materials:

A sample window has been delivered to you in order that you may ascertain extrusion and fabrication requirements.

Anticipated monthly unit requirements:

2000 units 3'0"x3'0".

Quotations Requested—Windsor Supply, Inc., A, B, & C, above:

(a) Raw materials.

(b) Fabricated doors and windows:

(Testimony of Carl Oldenkamp.)

Plaintiff's Exhibit No. 13—(Continued):

D. Shower Doors:

1. Number 100 Design #1.

A sample door has been delivered to you in order that you may ascertain extrusion and fabrication requirements.

Attached hereto as Exhibit A are die drawings of required extrusions.

Anticipated monthly unit requirements: 2,500.

E. Shower Enclosures:

1. Number 1150.

A sample enclosure has been delivered to you in order that you may ascertain extrusion and fabrication requirements.

Attached hereto as Exhibit B are die drawings of required extrusions.

Anticipated monthly unit requirements: 1,000.

2. Number 501.

A sample enclosure has been delivered to you in order that you may ascertain extrusion and fabrication requirements.

Attached hereto as Exhibit C are die drawings of required extrusions.

Anticipated monthly unit requirements: 2,500.

(Testimony of Carl Oldenkamp.)

Plaintiff's Exhibit No. 13—(Continued):

Quotations Requested—Windsor Supply, Inc., A, B, C, D & E, above:

(a) Raw materials as follows:

Extrusion Number	Quantity
10757	20,000 lbs.
10756	4,000 "
19981	2,000 "
15310	4,000 "
15311	2,500 "
28526	7,500 "
28530	4,000 "
24239	2,000 "
28531	1,000 "
28002	500 "
5011	6,500 "
5012	16,000 "
5008	7,500 "
5010	5,000 "
5006	16,000 "
5005	500 "
5007	750 "
Deluxe Sliding Door (approx.)	50,000
Standard Sliding Door (approx.)	76,000
Sliding Window (approx.)	40,000

(b) Fabricated Doors and Shower Enclosures.

(Testimony of Carl Oldenkamp.)

Plaintiff's Exhibit No. 13—(Continued):

F. Aluminum Angle:

Specifications: 1¼"x1¼"x3/16" Structural Angle 61 S-T6.

Anticipated monthly unit requirements: 2,000 pounds.

G. Aluminum Coil Stock:

Specifications: .040 35½H.

Anticipated monthly requirements: 2,000 lbs. 1 1/16" wide.

Quotations Requested—Windsor Supply, Inc., F&G, above.

(a) Raw materials.

Received in evidence November 22, 1955.

Mr. Mahoney: Will you please mark this for identification as Plaintiff's Exhibit No. 14?

(The document referred to was marked Plaintiff's Exhibit No. 14 for identification.)

PLAINTIFF'S EXHIBIT No. 14

Memorandum

To: R. C. Gunderson,

From: M. C. Plumley,

Date: November 26, 1954.

Subject: Information Obtained Phoenix Trip—(Reynolds Metals.)

(Testimony of Carl Oldenkamp.)

Plaintiff's Exhibit No. 14—(Continued):

The following is a recitation of certain points covered and information received on the trip made by you and me to Phoenix on November 23. There has been no attempt to organize the information in proper sequence and, as stated to you, I have merely attempted to list the various points.

Mr. Montgomery first stated that he felt a solution had been reached in engineering of the sliding windows whereby it would be possible, with not more than a 1/16" overlap at the stile, to provide within the various units window frames and glass of exactly equal sizes.

In regard to the sliding door and Reynolds' pricing thereof, the price quoted included all of the materials and labor costs on such doors, with the exception of certain parts which necessitated outside purchase. The labor necessary on these outside purchased parts was included in the quotation, with the exception of labor of weatherstripping which was not to be applied by Reynolds. The outside purchases include:

1. Latch and keeper.
2. Rubber bumpers (both small and large assemblies).
3. The rollers.
4. Dust stops.
5. Weatherstripping.

(Testimony of Carl Oldenkamp.)

Plaintiff's Exhibit No. 14—(Continued):

Mr. Gunderson explained to Mr. Montgomery the need for the SP sliding door, which is framed in wood and eliminates the need for jambs and header. A price was promulgated during the afternoon on this door and a quotation on an 8'x6'10" SP door of $21.70 was provided us.

Mr. Fontana, of the pricing department, requested some information concerning the sliding doors and windows, and it was estimated by Mr. Gunderson that a minimum of 15,000 doors would be purchased from Reynolds in the twelve months subsequent to the filing of our first order for release of doors. The tooling for these doors ($3,600), as well as the extrusion dies ($1,240), is to be amortized over the first 1,500 doors released This would indicate a total amortization of $4,840, or approximately $3.23 per door on the first 1,500 doors.

The quotations include freight to Glendale on the basis of 30,000 pound shipments. Any shipment under 30,000 pounds will bear, of course, an LTL rating and the differential must be borne by Windsor Supply, Inc. Since the carload (30,000 pound) rate is $1.39 per cwt. and the LTL rate is $2.21 per cwt., the differential to be borne by Windsor Supply, Inc., would be $.82 per cwt., or roughly $.27 per door.

Doors will be packed according to part and the boxes stenciled with the part and the number of

(Testimony of Carl Oldenkamp.)

Plaintiff's Exhibit No. 14—(Continued):

units contained therein. Our original order will be in the form of a blanket order for the amount contracted for over the first twelve month period, and each order thereafter will be considered a release against that original blanket order, such release orders to be for completed doors desired.

To more completely describe the mechanics of the ordering process mentioned above, it was explained that the information given Reynolds on Tuesday, as to the volume anticipated, will be made part of a written proposal which will be received by me from the Reynolds Metals Company. Immediately thereafter, Mr. Harry Sargent will provide us with a purchase contract, requesting our signature thereon and covering the volume to be contracted for per year from the first release. Thereafter, as stated above, our orders will be considered "release orders" against this purchase contract.

In regard to sliding windows, Mr. Gunderson estimated the same 15,000 unit annual requirement, and it was decided that releases should be on the basis of 2,000 units per release, in order to provide production efficiency to Mr. Montgomery, and in the amount of 3,000 units per release if possible, in order to eliminate the LTL freight differential which would be necessary on shipments of less than 3,000 units.

The problem involved in attempting to anticipate sizes for windows was discussed, and Mr. Mont-

(Testimony of Carl Oldenkamp.)

Plaintiff's Exhibit No. 14—(Continued):

gomery promised that this problem would be considered by Reynolds in release orders on windows. He indicated that he was sure we would have to call for small numbers of various sizes from time to time and that Reynolds would work with us. Of course, this will entail Windsor Supply, Inc.'s picking up the freight differential on such small releases, and we should in every instance attempt to order small numbers of unexpected sizes in conjunction with the balance of another full 2,000 or 3,000 unit release order. A further problem involved in these unexpected orders for various sized windows was presented by Mr. Montgomery. He requests that, should Windsor Supply, Inc., receive an order less proper specifications, we should, despite the fact that we could do little more than warn Reynolds, notify them of the order and the approximate time that we will desire delivery. Thereafter, of course, we should furnish these specifications at the earliest possible date, but this forewarning will assist Mr. Montgomery.

The tooling on the windows is the only item to be amortized, since we are making the dies at Pacific Machine Tool Corp. The tooling for fabrication will amount to approximately $3,875, and it is suggested that this tooling expense be amortized over the first 4,000 units, which would amount to roughly $.96 per unit on the first 4,000 released.

(Testimony of Carl Oldenkamp.)

Plaintiff's Exhibit No. 14—(Continued):

It was further decided that Windsor should give PMTC a purchase order on the dies which are to be made for windows, rather than go through the billing and rebilling process of having Reynolds order from PMTC and then bill Windsor for these dies.

In response to our request for information concerning the price at which dies should be made by PMTC for Reynolds, Mr. Montgomery stated that he would furnish the writer with Reynolds' formula for pricing of dies. Upon receipt of this formula, we will have an indication as to whether the price received will provide a profitable die making operation for PMTC.

The shower doors and enclosures became the subject of comment and a detailed description of the samples, as well as the die prints formerly furnished Mr. Montgomery was entered into. Mr. Montgomery will need details on cutting length on the #1150 and #501 enclosure and on the #100 and #600 door, along with a resume of mitering needs and any further detail pertaining to these items. We stated that the hinge can be furnished by Windsor Supply, Inc., and that we can further supply the dies for the handle [or handles themselves.*]

*[Matter within brackets appeared in longhand as an alteration on the original copy.]

(Testimony of Carl Oldenkamp.)

Plaintiff's Exhibit No. 14—(Continued):

Mr. Montgomery explained that it was impossible for him to accept the purchase order for the raw materials, but that this should be started in Los Angeles with Harry Sargent. By the time that shipment of these raw materials by Reynolds is possible, Mr. Montgomery will have provided us with prices on fabrication of the above items. Upon receipt of these prices, the decision will be made as to whether the fabrication will be by Montgomery or Windsor Supply, Inc., and routing of the extrusions will be made accordingly. Mr. Montgomery further suggests that the order presently to be placed be followed immediately by an order covering our future requirements and, of course, delivery on both orders can be switched to Mr. Montgomery if he is to fabricate.

The orders for the dies which were explained in detail to Mr. Montgomery should also be placed with Mr. Sargent, along with the order for extrusions.

It will not be possible to obtain the quotations on fabrication for approximately four weeks, which will be roughly the delivery date on raw extrusions. Prices on dies and raw extrusions can be obtained from Harry Sargent upon placement of the order.

M. C. PLUMLEY.

MCP:ss

cc: C. A. McLIN
Q. A. EWERT

(Testimony of Carl Oldenkamp.)

Plaintiff's Exhibit No. 14—(Continued):

Reynolds Metals Company

Quotations—Sliding Doors
November, 1954

F2

6′x6′10″	$27.80
7′10¼″x6′10″	30.41
8′x6′10″	30.48
10′x6′10″	33.80

F3

9′x6′10″	$39.29
11′10″x6′10″	43.24
12′x6′10″	43.46
15′x6′10″	48.40

F4

12′x6′10″	$50.61
15′7⅞″x6′10″	55.94
16′x6′10″	56.07
20′x6′10″	63.31

Identified November 22, 1955.

(Testimony of Carl Oldenkamp.)

Q. (By Mr. Mahoney): I now show you a memorandum to Mr. Gunderson from Mr. Plumley, dated November 26, 1954, and bearing Plaintiff's Exhibit No. 14 for identification, and ask you if in paragraph 3 and the remaining paragraphs on page 1 of that memorandum the practice set forth is substantially that which was followed in your dealings with Reynolds Metals Company?

Mr. Duque: Now, if the Court please, this is a memorandum, as I understand it, from Mr. Gunderson——

Mr. Mahoney: To Mr. Plumley.

Mr. Duque: Mr. Gunderson, as I understand it, your Honor, was the president of the Windsor Manufacturing Company. [133] Mr. Plumley was president of the Windsor Supply Company. They are taking a document——

The Court: State your objection.

Mr. Duque: I object to the question on the grounds that it is hearsay as to this defendant, and any testimony from this document as between Mr. Plumley and Mr. Gunderson is obviously hearsay. It is between the president of one corporation to the president of another corporation, and the defendant has no part in the memorandum or in the question.

Mr. Mahoney: The memorandum is introduced as a part of the records of Windsor Supply.

The Court: It isn't in evidence here. You are asking this witness——

Mr. Mahoney: We are asking a question relating to something set forth in this memorandum.

(Testimony of Carl Oldenkamp.)

The Court: You are asking this witness to read a document, to place his interpretation upon it and give his conclusion as to whether that conforms to a state——

Mr. Mahoney: Which he is cognizant of.

The Court: Which he may or may not be. It hasn't been shown yet whether it is or not.

Sustained.

Mr. Mahoney: Will you please mark this for identification as Plaintiff's Exhibit No. 15?

(The document referred to was marked Plaintiff's Exhibit No. 15 for identification.) [134]

Q. (By Mr. Mahoney): I now show you a proposal bearing the heading, "Parts Division, Reynolds Metals Company," marked Plaintiff's Exhibit No. 15 for identification, and ask you if you are familiar with the contents of that proposal?

A. Yes, I am.

Q. And on the back of the proposal do you find a printed statement, "Terms and Conditions"?

A. None as directly stated in that. Which one did you have?

Q. Do you find the term, "Quotation conditions," and under the term "Quotation conditions" a paragraph numbered 10, "Tools and Equipment"? A. That's right.

Q. Now, did you have any personal dealings with Reynolds Metals Company in regard to dies which were fabricated by the parts division for the

(Testimony of Carl Oldenkamp.)

account of Windsor Supply, Inc.? A. No.

Mr. Mahoney: I now introduce Plaintiff's Exhibit No. 15 into evidence.

Mr. Duque: To which I object, your Honor, on the grounds that it is incompetent, irrelevant, and immaterial; it has no bearing on the issues in this case. It is a document which purports to be a proposal from the defendant, Windsor Supply Company, which is not a party to this action, the [135] terms of which document are entirely different and entirely contrary to any document upon which plaintiff relies in this case.

I object to it upon those grounds.

The Court: May I see Exhibit 15 for identification, Mr. Clerk?

(Whereupon, the document was handed to the court.)

The Court: Was this proposal accepted?

The Witness: Not in its entirety.

The Court: The objection is overruled. Exhibit No. 15 may be received in evidence.

(The document referred to, marked Plaintiff's Exhibit No. 15, was received in evidence.)

Mr. Mahoney: Your witness, Mr. Duque.

(Testimony of Carl Oldenkamp.)

Cross-Examination

By Mr. Duque:

Q. Mr. Oldenkamp, do you have personal knowledge of the shipments which were received by Windsor Supply from Reynolds Metals Company?

A. Yes.

Q. Will you tell us what those shipments were, during the entire period of time in which Windsor Supply was doing business with Reynolds Metals Company, what those shipments consisted of? [136]

A. Well, each shipment? That would be pretty —I can give you general knowledge.

Q. Yes.

A. The first shipment consisted of extrusions without any fabrications by Reynolds.

The second shipment did consist of fabricated parts. They were received by Windsor Supply in bundles strapped together of like kind. There were a number of shipments that did not include any raw extrusions. The "raw extrusions," by that, I mean no fabrications done by Reynolds.

And then more recently there have been some extrusions received both ways, some fabricated and some unfabricated.

Q. At any time during the period that Reynolds Metals Company was doing business with Windsor, which has been referred to in your direct examination, do you know of any occasion upon which Reynolds Metals Company ever shipped to Windsor Supply Company a completed door?

(Testimony of Carl Oldenkamp.)

A. A door?

Q. A completely fabricated door. A. No.

Q. When you received these component parts or these extruded parts—and from your testimony I understand them to be rather long extrusions which form the frame of a door, is that correct?

A. That's right. [137]

Q. When you received those extruded parts, what did Windsor Supply Company have to do to make those into a door?

A. Well, first of all the packages had to be separated as to component parts.

Q. They had to be separated?

A. That's right. Then the head and the sill had to be identified with rubber stampings. The dust stops had to be installed in the head and sill.

Q. What does that mean? What kind of an operation is that?

A. We use an adhesive for holding the dust stop in place.

Q. What is the dust top?

A. The dust stop.

Q. Dust stop?

A. It is a wool-and-metal-backed weather seal. The jambs had to have the safety bumpers and the strike bumpers installed with those component parts.

The end rails, the top end rails are now presently being cut by us and drilled—I mean cut by us and tapped for the corner screws.

The bottom rails are presently cut by us to

(Testimony of Carl Oldenkamp.)

length, and the wheel carriers, along with the wheels and axles, inserted and staked in place.

Q. And the wheels and axles in all the other component [138] parts that you added to these extrusions, I assume you purchased from persons other than Reynolds Metals, is that correct?

A. That is correct.

Q. Could you have conceivably taken the extrusions that you received from Reynolds Metals and sold them to a customer as a finished door?

A. No.

Q. How long an operation is it to take and sort these extrusions and put together your component parts and package it under a Windsor label?

A. Well, in our production it's a—because of the quantity involved, by the time that we get the fabricated parts from Reynolds, it would probably take us about a week before finished doors would begin to come out of our shop.

Q. Now, did Reynolds Metals Company ever send you any of its extrusions which it sold you in cartons or boxes of any kind or shape?

A. I don't follow you there.

Q. Well, it's claimed here that Reynolds Metals Company sent the extrusions to you in a box, in a carton such as you see here in the courtroom, a long cardboard carton, and that you just took that box, threw in a couple of parts, put a Windsor label on it, and then sold it to the public. Is that what happened? [139] A. No.

(Testimony of Carl Oldenkamp.)

Q. In what kind of a container did you receive the extruded shapes from Reynolds, if any?

A. Well, the bundles had a piece of cardboard over each end and they were strapped together.

Q. In other words, they had a cardboard over each end and were strapped together?

A. That's correct.

Q. And when you received them you had to sort them as to size? A. That's right.

Q. So, as far as you know, did Windsor Supply Company, during the time you were there, ever do any business with Panaview, the plaintiff in this action?

A. There may have been a few instances, but they were isolated cases. I don't know of any, actually, myself.

Q. When the two corporations which Mr. Mahoney has identified as being essentially operated by the same man—when they were doing business with Panaview, do you know whether or not Panaview was furnishing Windsor with a completed, marketable, sliding door; or was that all done by Windsor Manufacturing?

A. That was done by Windsor Manufacturing.

Mr. Duque: That is all. No further questions.

Mr. Mahoney: Will the reporter read the last question to [140] the witness and the answer thereto?

(The record was read.)

(Testimony of Carl Oldenkamp.)

Redirect Examination

By Mr. Mahoney:

Q. What did you mean by that answer, Mr. Oldenkamp? What was done by Windsor Manufacturing?

A. Well, the sale of Panaview doors was handled by Windsor Manufacturing; and that Windsor Supply, for general business purposes, did not buy doors from Panaview.

Q. But when Windsor Manufacturing ceased to operate, Windsor Supply took over its accounts, is that not true? A. That's right.

Q. And Windsor Supply sold to W. P. Fuller & Co. in substantially the same manner as Windsor Manufacturing Company had done, is that not true?

A. They sold W. P. Fuller, that's right.

Q. And on the same basis, is that not true?

A. I can't——

Mr. Duque: To which question I object on the ground that it is immaterial what kind of a basis they sold on.

Mr. Mahoney: I will withdraw the question.

Q. But so far as Windsor Supply, Inc., is concerned, it took over the sales accounts of Windsor Manufacturing, is that correct? [141]

A. That is correct.

Mr. Mahoney: That will be all.

Mr. Duque: No further questions, your Honor.

(Testimony of Carl Oldenkamp.)

Mr. Mahoney: No further questions.

The Court: Well, I understood that question that Mr. Duque asked the witness, the last question asked him, to mean, did Windsor assemble the doors it got from Panaview in the same manner it assembled what it got from Reynolds?

Mr. Mahoney: That is a possible construction of that question, but I don't think it is what Mr. Duque intended, your Honor.

Mr. Duque: No, your Honor. I asked Mr. Oldenkamp——

The Court: Well, I heard it, and then I heard it read back. But I place that interpretation upon it, and apparently that is not the interpretation that either one of you intended.

Mr. Duque: Well, what I was trying to find out from Mr. Oldenkamp was whether or not Panaview, when it was selling to Windsor, was selling them completed, retail marketable doors or whether they were operating in the same manner as Reynolds and Windsor, and apparently he doesn't know. So what I propose to do is to call Mr. Gunderson, who was the president of Windsor.

The Court: I don't know if we have explored his knowledge on that point or not. [142]

Resume the stand, Mr. Oldenkamp.

Were you there when this company you were with bought doors from Panaview?

The Witness: I was with Windsor Supply at that time.

The Court: Were those completed doors, ready

(Testimony of Carl Oldenkamp.)

to be sold, or did you have to do something to them, too?

The Witness: To my knowledge, and I saw the doors that Windsor Manufacturing was buying from Panaview, the doors that they were buying were completely marketable, ready-to-ship items.

The Court: Anything further from Mr. Oldenkamp?

Mr. Duque: No, your Honor.

Q. (By Mr. Mahoney): And were those doors in KD form?

A. They were, in the sense of the word, knocked-down, yes.

Q. In other words, they were shipped to you with the extrusions in the package, and no glass?

A. Yes, ready to be shipped to glass dealers.

Q. And when they got in the field, all the screws —how did you put these screws and things that were used to hold the extrusions together in the box, in the container?

The Court: In what connection?

Mr. Mahoney: The screws which were used——

The Court: Whose door? You mean the parts they received from Reynolds or the parts—— [143]

Mr. Mahoney: What I am trying to ask him is:

Q. How did you put the screws for the extrusions which were assembled into a kit for a single door—how did you put those in the container?

The Court: From Panaview or from Reynolds?

Mr. Mahoney: From Reynolds.

The Witness: We put them in a paper sack.

(Testimony of Carl Oldenkamp.)

Q. (By Mr. Mahoney): They were just thrown in a paper sack, is that correct?

A. That's right.

Q. And you didn't put the vinyl weather stripping in the frames in many instances, did you?

A. No.

Q. You just threw it in as you brought it off the roll, is that correct?

A. We measured it and bound it and put it in the box.

Q. In other words, you didn't even install it in the sash itself? A. No.

Q. And how long do you think it would take you to install a rubber bumper in a jamb?

The Court: Is that material? As I understand it, neither party installed the door.

Mr. Mahoney: We are talking about installing the rubber bumper in the door frame before it went out in KD condition. [144]

The Court: Did that happen?

The Witness: When we take the parts from Reynolds, we put the bumpers on those.

The Court: What did you do from Panaview? Were they already on?

The Witness: Windsor Manufacturing received a complete kit with everything in it.

The Court: Complete in the sense in which you now ship it?

The Witness: That's right.

The Court: Then answer Mr. Mahoney's question. How long would it take to put on a stop?

(Testimony of Carl Oldenkamp.)

The Witness: Oh, there are four bumpers on a door. I'd say three or four minutes apiece.

Mr. Mahoney: That will be all.

Mr. Duque: May I interrogate the witness, your Honor?

The Court: Yes.

Recross-Examination

By Mr. Duque:

Q. You talk about "knocked-down doors," Mr. Oldenkamp. By "a knocked-down door," what do you mean?

A. Well, we mean everything—when we sell it to our customer, everything but the glass.

Q. In other words, what Windsor bought from Panaview [145] was a completed, marketable, knocked-down door? A. Right.

Q. What they bought from Reynolds were extrusions which constituted component parts to a door? A. That's right.

Q. But you would then add the other component parts, package it, and sell it to your customer as a knocked-down door? A. That's right.

Q. But you never bought any knocked-down doors from Reynolds Metals Company, did you?

A. Not in the sense that we sell it.

Q. In other words, you bought the component extrusions for a knocked-down door from Reynolds—— A. Right.

Q. ——but not the knocked-down door itself, is that right? A. That's right.

Mr. Duque: That is all.

The Court: You may step down, Mr. Oldenkamp. You are excused.

(Witness excused.)

The Court: What about Mr. Oldenkamp's records here?

Mr. Mahoney: Yes, your Honor, we were just about to make an offer there. There are the Fuller invoices which we would [146] be happy to release to Mr. Oldenkamp. And can't we release the bulk of this material? There are a few items which we might need for cross, out of folders which are marked "Reynolds." Could you do business without those for a couple of days, perhaps?

Mr. Oldenkamp: Well, I suppose; if it is going to expedite the trial, we can leave them here.

The Court: Very well, Mr. Oldenkamp.

Mr. Mahoney: Let us get the file for Mr. Oldenkamp which contains the Fuller invoices, and we will release them to him now.

The Court: Those were marked as what exhibit?

Mr. Mahoney: Those were marked, I believe, your Honor, as Exhibits——

Mr. Duque: 9 and 10.

Mr. Mahoney: We are not releasing some of the material which is in No. 9.

The Court: Well, are you releasing any of it? According to my notes, we have Exhibits 9-A, -B, -C, and -D.

Mr. Mahoney: We will be keeping 9, your Honor, and releasing 10.

The Court: Is it agreeable that Exhibit 10 for identification be returned to Mr. Oldenkamp?

Mr. Duque: Yes, your Honor.

The Court: Very well. So ordered pursuant to stipulation. [147]

Mr. Mahoney: Your Honor will recall that at the initiation of the action of this trial there was a discussion of the stipulation that the various affidavits of the witnesses be accepted as testimony, and I believe that that stipulation was that we would both share in the interest between both parties to the action. Now, there are numerous conclusions in these affidavits which relate to such matters as custom in the trade, which would permit variance in the terms of the "Acknowledgment." And the plaintiff is in the position where, if it is necessary for us to rebut these conclusions made by the various deponents in the affidavits, we could now put on witnesses who would rebut those conclusions regarding the practices in the trade as propounded by the deponents of the defendants here in those affidavits.

It is our position, generally, that the "Acknowledgment" and the terms thereof are so clear that there is no room for testimony regarding custom in the trade. But if your Honor is going to accept the statements of the deponents in the affidavits to that effect, then we will necessarily be compelled to put on rebuttal testimony.

The Court: That would be rebuttal, though, would it not, and not part of your case in chief?

Mr. Mahoney: That is correct.

The Court: I don't know what the defendant may offer.

Mr. Mahoney: But there is already testimony which we [148] have to rebut in those affidavits.

The Court: They haven't been offered yet.

The stipulation was, as I understood it, that if counsel so desired any affidavits on file might be offered as, pro tanto, the direct testimony of the affiant, subject to cross-examination and subject to supplementing the affidavit with further direct testimony.

Mr. Mahoney: This is a situation which I desire to clarify, your Honor, at this moment.

The Court: None have been offered.

Do you intend to offer any in evidence?

Mr. Mahoney: No. I am bringing this up to see if Mr. Duque desires to offer these affidavits.

Mr. Duque: Well, your Honor, my understanding was identical to the court's understanding.

The Court: Do you expect to offer any?

Mr. Duque: We haven't offered any yet.

The Court: Do you expect to offer them? That is Mr. Mahoney's question, as I understand it.

Mr. Duque: Well, it depends upon what the plaintiff's case consists of, your Honor. I may or may not offer them. I have all the witnesses here in court. If we put on testimony, I may stipulate that the affidavits may be considered direct, and

let Mr. Mahoney cross-examine, if it will expedite the trial. [149]

What I am trying to say is that I am perfectly happy to offer the affidavits in evidence as the direct testimony at the appropriate time, your Honor.

Mr. Mahoney: I will then call the next witness, Mr. Reznick.

The Court: Well, for the purpose of rebutting——

Mr. Mahoney: Not for the purpose of rebutting; direct testimony, your Honor.

JERRY REZNICK

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Jerry Reznick.

The Clerk: How do you spell your last name?

The Witness: R-e-z-n-i-c-k.

Direct Examination

By Mr. Mahoney:

Q. What is your full name?

A. Jerry L. Reznick.

Q. Where do you reside?

A. 5758 Noble Avenue, Van Nuys.

Q. What is your connection with Panaview Door & Window Co.?

(Testimony of Jerry Reznick.)

A. I am vice-president and general manager of the [150] Panaview Door & Window Co.

Q. Do you have any other offices in the associated Companies?

A. Yes, sir. I am also vice-president in Glide Windows, Incorporated.

Q. Now, Mr. Reznick, what are your duties as vice-president of Panaview Door & Window Co.?

A. To supervise the general run of the business, such as to see that orders come in, that purchases are made in proper time, and production, and so forth, in general.

Q. Do you handle financial negotiations for the corporation? A. Yes, I do.

Q. And were you conversant with the development of the Panador sliding door which was developed by Mr. Grossman? A. Yes, I am.

Q. Can you explain how you would keep in touch with such development by Mr. Grossman?

A. Well, when Mr. Grossman gets an idea about developing a new product, which has happened during our association in the past years, he would come to me and tell me that that is what he is working on. And, of course, I would also either agree or disagree to that idea, whether it's a good idea to continue with that kind of a new product.

Mr. Duque: Your Honor, I am going to be required to [151] object to any conversations or discussions between Mr. Grossman and Mr. Reznick as being hearsay as to this defendant.

And I move to strike the last portion of the wit-

(Testimony of Jerry Reznick.)

ness' answer, as to what Mr. Grossman told him about the development of the door.

Mr. Mahoney: Your Honor, these conversations are exceptions, if they can be considered hearsay, to the hearsay rule in that they constitute verbal acts.

The Court: What is the purpose of offering it?

Mr. Mahoney: The purpose of offering it is to show that Mr. Reznick was directly concerned from the very first with the relationship between Reynolds Metals and the plaintiff here as is concerned with the Panador, and that Mr. Reznick, by a natural evolution of events, became the instrument whereby the first relationship with Reynolds Metals was established to manufacture the extrusions for this door for plaintiff here. This is a little background history.

The Court: What difference does it make whether they debated it a long time or did it on the spur of the moment?

Mr. Mahoney: I didn't expect the witness to answer at length. I just asked him if he knew, and how he would know about the development like this, to show the reasonability of the next——

The Court: Well, he is the general manager of the company. I would assume he knows, like most general managers, [152] practically everything that is going on.

Mr. Mahoney: Well, I will make it a subject of judicial notice that he would know anything of that

(Testimony of Jerry Reznick.)

importance, when it was made, such as a new product.

Q. Mr. Reznick, do you recall the first person associated with the Reynolds Metals Company with whom you discussed the Panador sliding door?

A. Yes. It was Mr. Harry Sargeant.

Q. Was there anybody else present at this discussion?

A. No. There was just he and I. We were just standing sort of on the side, among a crowd of people that was at a party in Seattle, Washington, when Mr. Sargeant referred to the——

Mr. Duque: Just a moment, Mr. Reznick.

May I interrupt, your Honor, to get the date of this conversation? We have the place and the persons present.

Mr. Mahoney: I was going to ask the date just as soon as he finished.

The Court: Gentlemen, while we are interrupted, the last motion to strike is denied.

Lay the foundation so we all may know the time, place, and persons present.

Q. (By Mr. Mahoney): When did this conversation take place?

A. It was in the early part of '54. It was [153] at a meeting of Fuller—of the W. P. Fuller Company. We, as a basic supplier for W. P. Fuller—and when I say "we," I mean Panaview—were invited to attend their meetings and demonstrate our product. And we were traveling from one regional branch to another regional branch. And it

(Testimony of Jerry Reznick.)

was taking place from—let's see—from Los Angeles, San Francisco, Seattle, and other towns throughout the twelve Western States.

At one of the parties, Mr. Sargeant——

Q. When did this party take place?

A. I believe it was in Seattle, Washington. The manager of that branch gave a party for all these traveling salesmen and the suppliers.

Q. Now, who else was present at this conversation that you had with Mr. Sargeant?

A. At the conversation, no one else was present. It was just Harry Sargeant and myself were discussing—we were debating at that time about a certain disagreement that there was between Reynolds Metals—at that time there was a disagreement between Reynolds Metals and Panaview Door & Window Co., which it seemed to me that Harry Sargeant was not even aware of at that time, because it was the year previous to that we had received material from Reynolds Metals for a certain Thermo-pane door that was ordered a year before that. Instead of the six weeks delivery, which they promised, it took ten. [154]

Q. Who was this door ordered by?

A. By me.

Q. What company?

A. By Panaview, I mean, to Reynolds, through their salesman. And one day, when they didn't deliver—they were late in delivering, and in the meantime that order that we had, the specific order number of Thermo-pane doors, was canceled out on us.

(Testimony of Jerry Reznick.)

Nevertheless, Reynolds dumped that material. It was a matter of about 80,000 pounds. And they dumped that material and said they would accept no cancellation. We refused to pay for that material, only in the sense that it was to us only scrap value, we were willing to settle for the scrap value. And in the meantime negotiations were going on between our attorneys and their attorneys; and there was no settlement.

Q. There was no actual suit?

A. No actual suit was taking place.

Q. Why was this order canceled out by your customer? A. Because——

Mr. Duque: Just a minute, please, Mr. Reznick. I object to the question on the ground that it is completely immaterial.

The Court: What is the purpose of it?

Mr. Mahoney: Well, to show a history of—to show that they had every reason not to go back to Reynolds on this Panador situation, and also to show that there were certainly [155] relations here which had not been equitable, to say the least, and that there was inducement on the part of Reynolds to bring Panaview back into the fold, and that we didn't go running after Reynolds in an effort to get them to manufacture the extrusions for this door.

The Court: I will overrule the objection.

Have you about finished?

Mr. Mahoney: Yes. I want him to get on the direct subject matter.

(Testimony of Jerry Reznick.)

The Court: Overruled.

Q. (By Mr. Mahoney): Mr. Reznick, what was your conversation with Mr. Sargeant relating to the Panador?

A. In order to relate it to the Panador, I have to go back to that story, how it came about, and that's the only way I can relate it to the Panador.

Q. Do it briefly.

A. I will do it briefly if your Honor will permit.

The Court: Proceed.

The Witness: In that conversation Harry Sargeant asked me why we stopped buying materials from Reynolds. And he at that time indicated he knew we were using a great number of extrusions. And he said, after all, he was the first one to sell us the first carload of material.

I explained to him the reason for it, the reason we stopped buying was because of this here inconsistency in their [156] deliveries of material, and they were trying to collect—it was a matter of about $16,000 they were trying to collect, for which they were not entitled to.

He said to me, "I will see to that if you promise that you are going to go back as our customer and buy materials from us, I will see to that, that that will somehow be settled. Either it will be taken back, that material that was sent to you, or else we will give you a long term to pay for it, whichever you will choose."

And at that time I told him that we were coming

(Testimony of Jerry Reznick.)

out—it was a secret, I said, very secret, and I said, "We haven't got the completed drawings yet, but we are coming out with a new door, don't have a name for it yet, and that door will revolutionize the sliding-door industry to the extent where"——

We always had to compete with steel sliding doors. Aluminum is a higher-priced metal, and we had to compete with the steel sliding-door industry.

I told him that Abe Grossman, my associate, had already designed a door that will revolutionize the industry and we will be using a great deal more material than we ever used before.

Now, that was the conversation at that time.

Q. (By Mr. Mahoney): Now, what did Mr. Sargeant say in response to your conversation?

A. He said that he will see to that, that some settlement [157] will take place.

Q. And did you have any further discussions with Mr. Sargeant relating to sliding doors?

A. That ended there then. Oh, yes, there was something else.

At that time he also expressed a possibility of Reynolds buying doors; for us, that is, to design and manufacture a door for them, because they were making a casement window, selling a casement window, and there was always a demand, whenever they sold a casement window, the owners of the house would also require a sliding door, and they didn't have a sliding door of their own. And he discussed with me the possibility of having us manufacture a sliding door for them.

(Testimony of Jerry Reznick.)

Q. And what was your response to that?

A. I told him that could be arranged.

Q. Now, did you ever have another conversation with the personnel of Reynolds Metals Company regarding this Panador?

A. Yes. That was later on.

Q. What time did that take place?

A. It was about two or three weeks after that, after those meetings. There were three gentlemen of Reynolds Metals came over to see us. When I say "us," I mean Mr. Grossman and myself.

Q. Who else was present at this meeting? [158]

A. At that time, Mr. Miles or Niles, their credit manager, their sales manager——

Q. Who was that?

A. Mr. Yates—and their salesman.

Q. Who was that?

A. Al Kavich, I believe, was his name.

Q. Now, where did this conversation take place?

A. That conversation took place in Mr. Grossman's office.

Q. And how did the subject matter of the Panador come into that conversation?

A. We told them there, too, a new sliding door was being designed and that we will need a lot of aluminum extrusions. And they were anxious to take the order for the extrusions provided we could settle this dispute over the $16,000.

Q. How did you settle the dispute?

A. Well, we finally agreed and we settled. We agreed to make it in a long-term note; let's say

(Testimony of Jerry Reznick.)

$2,000—it was about $2,000 a month; we agreed to pay them off. And we felt that perhaps during that period of time there would be a chance to sell that material.

Q. Now, Mr. Reznick, did you ever have any dealings with Mr. McLin of Windsor Manufacturing Company? A. Yes. [159]

Q. Did these dealings take place while Windsor Manufacturing Company was still buying Panador doors from your company? A. Yes.

Q. And do you recall what the subject matter of the conversation was, and where it took place? Where did the conversation take place?

A. In Pasadena, in Mr. McLin's office.

Q. Who was present at this conversation?

A. At that time Mr. Gunderson was present. Of course, Mr. McLin. Mr. Terpinson was there, and also myself. There was also another gentleman present. I don't recall his name, but he was one of Mr. McLin's men.

Q. Now, what was the subject matter of the conversation?

When did the conversation take place? Do you recall that? A. It was late '54.

Q. What was the subject matter of the conversation? A. Money.

Mr. Duque: To which we object on the grounds that it is hearsay so far as this defendant is concerned, and incompetent, irrelevant and immaterial.

Mr. Mahoney: Your Honor, it is not hearsay because, once again, this is a series of verbal acts

(Testimony of Jerry Reznick.)

in which it will be established that Mr. McLin and Windsor Manufacturing Company [160] were induced to sever their relationship with Panaview Door & Window Co. because they were already negotiating and had negotiated with other parties to obtain a supply of extrusions, and, therefore, it was easy for Windsor Manufacturing Company to jump from one supplier to another; and that, as the records will show, this supplier was the Reynolds Metals Company.

The Court: I don't see the materiality of it. That's a matter of everyday practice, I suppose.

Mr. Mahoney: It isn't a matter of everyday practice, your Honor, for someone——

The Court: One customer will change to another supplier.

Mr. Mahoney: That is true where the suppliers are on an even footing, your Honor. But you would have to look long and hard to find a situation in which an extruder was going after the customer of a company which was purchasing extrusions from the extruder. I think that you would probably find that this is probably a case of first impression and that the facts here are unique, except for a perfectly standard item which was manufactured by the extruder and sold directly to the trade.

The Court: Is it material here whether Windsor was already a customer of Reynolds?

Mr. Mahoney: It certainly is material, because —we are not showing that Windsor was already a customer of [161] Reynolds.

(Testimony of Jerry Reznick.)

The Court: Assuming that it was, is it material whether they were or were not already a customer?

Mr. Mahoney: It certainly is material, your Honor, because it shows that with one hand Reynolds, in a position of trust and confidence, was doling out material to Panaview, and at the same time it was establishing Windsor as a competitor of Panaview for its own profit.

The Court: What does this conversation have to do with that?

Mr. Mahoney: This conversation will show that Mr. McLin, when they began discussing the subject matter of debts which had accumulated and when they would be paid, Mr. McLin said, "Well, if you don't go on supplying us, we will then terminate our relationship. And we already have established a source of supply."

And we will show that the break with Windsor came about because of the fact that Reynolds Metals was facilitating Windsor's scot-free departure from Panaview, and it would not have done so if there had not been a source of supply readily and immediately available, which is a rather important aspect of the situation.

The Court: Well, it isn't part of the claimed wrong here, is it, that Reynolds took away a customer from Panaview?

Mr. Mahoney: It is certainly part of the [162] unfair competition aspect of the thing, that in a fraudulent assumption of a fraudulent position wherein it was acting as the sole supplier for Pana-

(Testimony of Jerry Reznick.)

view, it then, behind Panaview's back and in a complete breach of its equitable relationship, went and supplied Windsor with the very materials which only Panaview was entitled to.

The Court: Wouldn't the situation be the same, according to your theory, if Reynolds supplied X, whom you had never heard of, who is a newcomer to the business?

Mr. Mahoney: Well, the wrong was aggravated by the fact that they didn't go out and——

The Court: Aggravated legally or aggravated emotionally?

Mr. Mahoney: Aggravated legally.

The Court: How was it aggravated legally?

Mr. Mahoney: Because there was already a direct connection between Panaview and Windsor.

The Court: Is it part of your claim here of unfair competition that Reynolds took Windsor away from you as a customer?

Mr. Mahoney: Part of our claim here is, the fraudulent acts of Reynolds, which will be detailed by the witnesses, constitute unfair competition in accordance with California statutes pertinent thereto.

The Court: But you would say that if Reynolds, under the circumstances here, supplied X, wouldn't you, who is a [163] competitor?

Mr. Mahoney: We'd say that so far as the breach of contract was concerned.

The Court: Well, you would say it as far as the entire case, wouldn't you?

(Testimony of Jerry Reznick.)

Mr. Mahoney: Yes, your Honor.

The Court: And it wouldn't matter whether X had ever done business with Panaview or not, would it, as long as X is a competitor of Panaview?

Mr. Mahoney: Well, no, I think, your Honor, here Windsor is in a different position from X. It is obvious on the facts that there was an established relationship between Panaview and Windsor, which was a benefit to Panaview. If X came along cold and——

The Court: Well, all right. Are you suing here to recover damages arising from the wrongful acts of Reynolds in taking away a customer from you?

Mr. Mahoney: We are suing here for breach of contract.

The Court: But it has nothing to do with taking a customer away from Panaview, does it?

Mr. Mahoney: It certainly does, your Honor, because the acts of Reynolds in this regard were in wilful aggravation of the wrong and not emotional aggravation. But we are asking for punitive damages here because of Reynolds' flagrant acts in regard to its primary customer, Panaview. [164]

The Court: Are you offering this on the issue of punitive damages?

Mr. Mahoney: We are going to offer something else on that, your Honor. But this is the starter.

Frankly, what this shows, your Honor, is that the Reynolds Metals Company, all the way through this situation, was in breach of its relationship,

(Testimony of Jerry Rezmick.)

with trust and confidence, that it did everything it possibly could, if it had intended to destroy——

The Court: Just stop it a minute and tell me what the purpose of it is. Is the purpose to show the relationship of the parties? Is that the purpose?

Mr. Mahoney: That is correct, your Honor.

The Court: It will be received for that purpose only. Overruled.

Q. (By Mr. Mahoney): Mr. Rezmick, what was your discussion relating to the Powder with Mr. McLin?

A. At that time, Mr. McLin—that is, the Windsor Company, owed us somewhere around $80,000. I came there to see if we can collect all or part of that. And that was my purpose of the visit there.

When I came there, Mr. McLin took us in the office and said, "We can't pay you now. We will go through our records and we will see, and perhaps in the future we will—in a few days or in a couple of weeks we will be able to pay you [165] then. But in the meantime, we demand that you send us merchandise."

I says, "We can't send you any more because so far we can go only that much with you, $80,000"—or whatever the amount was at that time. It was more than the credit that that company deserved.

And here are the words that he said to me—he said, addressing me by my first name: "Jerry, I have spent between $50,000 and $60,000 to develop the Windsor Company, to develop a client like W. P. Fuller Company, and I want you to know

(Testimony of Jerry Reznick.)

that I have taken measures to protect myself in case you don't supply me with merchandise. If you don't supply me with merchandise, I will be bound to go elsewhere. In fact," he says, "I can have within two weeks ready doors delivered to me." That is the exact expression he said. And by then we wound up not collecting any money.

Q. Mr. Reznick, when did you first discover that Windsor Supply Company was selling or supplying doors to the trade which were identical, or substantially identical, with Panador?

A. About two months later.

Q. Well, can you——

A. It was in the first—the early part of '55 when an employee of McLin called me and told me about it. Up to that time we didn't know. [166]

Q. Do you remember the name of this employee?

A. I believe his name was George Birch.

Q. What did he tell you?

Mr. Duque: Your Honor, again I object on the grounds that it is incompetent, irrelevant, and immaterial, and hearsay insofar as this defendant is concerned.

Mr. Mahoney: Your Honor, it certainly is not incompetent, irrelevant, or immaterial. We are considering the very——

The Court: It's hearsay, though.

Mr. Mahoney: Well, it constitutes, once again——

The Court: If you are offering it as to the truth of it—state your purpose. Don't argue. Don't argue unless I ask you for argument. State your purpose.

(Testimony of Jerry Reznick.)

Mr. Mahoney: My purpose here is to show how and when the plaintiff first discovered the infringement, the acts that——

The Court: He said that. He said in the early part of 1955 an employee, whom he thinks was named Birch, told him. Now, what difference does it make what Birch said to him?

Mr. Mahoney: I will withdraw the question, your Honor.

Q. (By Mr. Mahoney): Did you, after that communication to you by Mr. Birch, attempt to contact any of the representatives of the Reynolds Metals Company?

A. No. But between that time a Reynolds [167] Metals representative was in my office, their salesman, trying to sell me.

Q. What was his name?

A. Al Kavich. He came in my office asking for an order for materials. And, in fact, I believe we had some orders in the place. He asked what to do with that order, and I told him he might as well cancel it out because we are not going to buy any more material from Reynolds, knowing what wrong they did to us.

Q. And what did Mr. Kavich say to that?

A. He was very surprised and said it couldn't be. In fact, he said he will talk to the other salesmen in that territory who might be supplying to Windsor, and he will let me know about it.

And about a week later he called me and told

(Testimony of Jerry Reznick.)

me that the salesmen weren't selling any extrusions to Windsor Supply Company.

To get down to the core of it, I again contacted that person, George Birch, to find out whether it was true what he was telling me. And he told me yes, that that was true, but they were getting it through the parts department, and that's the reason their salesman couldn't find any record of selling their extrusions.

Q. The parts department——

A. Of Reynolds Metals Company, which means prefabricated [168] parts.

Q. Mr. Reznick, did you ever have any conversation with any other personnel of Reynolds Metals Company regarding this matter of the supply by Reynolds of extrusions to Windsor Supply Company?

A. Yes, with Mr. Miles over the phone a few times.

Q. And what was the purpose of the conversations?

A. It was always—whenever he called me, I would always tell him what—well, I won't use that word in court—what a trick they played on us in giving credit to a company that we couldn't collect money from, and he gave them credit.

And he said it was against his judgment; he was against it. He personally said it to me.

Q. Mr. Reznick, did the sale by Reynolds Metals Company of the component extrusions for an aluminum frame sliding door, which was substantially

(Testimony of Jerry Reznick.)

identical, except in minor details, with the Panador, handicap the sales of the Panaview Door & Window Co.? A. Yes.

Mr. Duque: To which question I object on the grounds it calls for a conclusion of the witness, and is not the best evidence.

The Court: What would be the best evidence?

Mr. Duque: What would be the best evidence, your Honor? [169]

The Court: Yes.

Mr. Duque: That the sales of Panaview dropped as a result of the delivering of extrusions by Reynolds to Windsor. And I think that their books and records would be the best evidence.

I think this is a sheer conclusion of this witness.

And in the second place, I don't see how it could be relevant here in this case to say that the sale of extrusions by Reynolds to Windsor would be relevant as to any cause of action that is sued upon here. It couldn't be relevant on the breach-of-contract cause of action. It can't be relevant on the alleged breach of trust and confidential relationship, no part of which has been proven. Nor can it be relevant to the unfair competition, no part of which has been proven.

The Court: It is relevant to the issue of damage, isn't it? It's his conclusion, but it is a conclusion that I think the general manager of a business should be permitted to state. Your objection, as I view it, goes to its weight, and you may cross-examine him fully on it.

(Testimony of Jerry Reznick.)

His answer may stand. I believe his answer was "yes," was it?

The Witness: Yes.

Q. (By Mr. Mahoney): Can you explain that, Mr. Reznick?

A. Yes, I can explain. When we first developed the door, the Panador, we call it now, I was in constant touch with [170] the Fuller Company. I had taken a sample of that door and demonstrated it to W. P. Fuller in Mr. Fuller's office, himself, Palmer Fuller's office, who I believe is the president of the company; the manager of W. P. Fuller, Mr.—oh, what's his name? I will think of it. Oh, Walsh. Jack Walsh was present. And so was Ben Gunderson, representing Windsor. And we were naturally the prime supplier. And we showed him that door. And when I demonstrated that sample door, which is a sample exactly similar to this one, they were very much impressed. And then we told them the price we could sell the door for, and they were immediately impressed. And immediately they were talking about a 3,000-door order, an initial order of 3,000 doors, and from then a minimum of a thousand doors a month. That was the discussion. Then it ended there, of course, with the possibility—I was not the one to take the order. It was up to Windsor, which is Gunderson, to take the order.

A week later, in Gunderson's office, Mr. Gunderson showed me the order from them for 3,000 doors. But we never did receive the order for the 3,000 orders. All we supplied them probably was a small

(Testimony of Jerry Reznick.)

amount of the doors in comparison to the 3,000-door order.

Mr. Duque: Your Honor, I move that the entire answer be stricken as nonresponsive to the question and as a self-serving statement by the witness, and hearsay as to this [171] defendant.

Mr. Mahoney: Your Honor, the witness was asked to explain his conclusion and to explain why he believed the actions of Reynolds harmed the plaintiff here, and he has explained it in his own language as plainly as he can. And I think the statement is competent on the same basis that he was general manager.

The Court: The motion is denied.

Q. (By Mr. Mahoney): Mr. Reznick, do you recall approximately when your relationship with Reynolds, so far as the manufacturing of extrusions for the Panador was concerned, was terminated?

A. Yes. That was after we established the fact and that I was fully convinced that they were supplying doors to Windsor.

Q. Now, during the period in which Panaview was being supplied with extrusions by Reynolds Metals Company and after the termination of your relationship with Windsor, did you have difficulty with unbalanced shipments received from Reynolds Metals Company?

A. Yes, very much so. They would ship parts of a certain extrusion and then—oh, yes. To get back—in order to answer this question I have to get back to our original negotiations, when we first

(Testimony of Jerry Reznick.)

started negotiations on that Panador. I explained to the sales manager and the credit [172] manager at the time that to us one extrusion only is worthless, that unless we have all the parts together to make one door so that that door can be made into a unit and then shipped and invoiced, that that door is worthless to us. Many times they would send material—they were sending before, in our previous experience with them, they were sending material in partial shipments but not related to each other. We have made an agreement with them, with the credit manager, with Yates—I have made an arrangement that until all of the order is completed—it will be due on 30 days from the date of the order, that will be when the order was completed. That was my arrangement with them.

Q. And your answer to the question relating to the difficulties encountered? A. Oh, yes.

Q. The difficulties which were encountered by incomplete shipments?

A. Yes. That was in the latter part of the year of 1954—that was worse—where they sent out certain parts and held back on the rest of the shipment. We were stymied with a great number of material and the orders that we couldn't fill. And that created a great hardship, and we would either have to let men go, on the job, or else close the shop. That was the matter.

Q. And did you encounter this difficulty in the period [173] from January, 1955, to June, 1955?

(Testimony of Jerry Reznick.)

A. In the beginning it was so bad, at the end of the year 1954——

Q. We are not talking about the beginning. I am talking about January, 1955, to June, 1955.

A. That was worse. That was the worst period of those bad shipments.

Mr. Mahoney: That will be all. Your witness, Mr. Duque.

The Court: Was W. P. Fuller the plaintiff's customer or was Fuller the customer of Windsor?

The Witness: Well, W. P. Fuller was a customer of Windsor. That is, Windsor was acting almost like an agent through which we—we were selling to Windsor, and Windsor was selling to Fuller.

The Court: But your company never sold Fuller, as such?

The Witness: At that time Windsor—we were selling Windsor.

The Court: Were you ever selling Fuller?

The Witness: We are selling Fuller now.

The Court: I mean prior to the time that Reynolds started supplying Windsor, was Fuller ever the customer of the plaintiff here, your company?

The Witness: Fuller was the customer of Windsor, and we were supplying Windsor.

The Court: We will take the noon recess at this time [174] until 2:00 o'clock.

(Whereupon, a recess was taken until 2:00 p.m. of the same day.) [175]

November 22, 1955—2:00 P.M.

The Court: Are there any ex parte matters?

The Clerk: No, your Honor.

The Court: You may proceed with the case on trial.

JERRY REZNICK

called as a witness on behalf of the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

Mr. Duque: We have no cross-examination of Mr. Reznick, your Honor.

The Court: Very well. You may be excused.

(Witness excused.)

The Court: Plaintiff's next witness?

Mr. Mahoney: Your Honor, I would like to call Mr. Grossman to the stand once again because he has discovered in his personal records some evidentiary material consisting of a series of letters between the Reynolds Metals Company and Mr. Grossman personally regarding the subject of the permission to use dies.

The Court: You may recall Mr. Grossman for further direct examination. [176]

ABRAHAM GROSSMAN

a witness called by the plaintiff, having been previously sworn, was recalled and testified further as follows:

Further Direct Examination

By Mr. Mahoney:

Q. Mr. Grossman, I show you Plaintiff's Exhibit No. 16 for identification, which is constituted by a letter dated March 19, 1951.

Mr. Duque: May I inquire of counsel? Have I seen any of these?

Mr. Mahoney: I am going to show them to you as I present them. Mr. Grossman has just produced these.

The Court: Hand over the rest of them to counsel and let counsel examine them while you proceed, if you will, Mr. Mahoney. This is Exhibit 16 for identification that you have, is that correct?

Mr. Mahoney: That is correct, No. 16.

Q. (By Mr. Mahoney): Mr. Grossman, I ask you to explain the circumstances which dictated the sending of the letter, Plaintiff's Exhibit No. 16 for identification?

A. During this particular period I had gotten patents on the Glide windows and doors that necessitated an agreement with Glide Windows and me where the ownership, as part of the agreement between us, the ownership of the dies was to be in my [177] name.

At that time a Mr. Lewis from the Reynolds sales department was told, when he made a call on us, that this was going to take——

(Testimony of Abraham Grossman.)

The Court: Told by you?

The Witness: By me, yes. When he made a call to us, he was told that this was to be done and that the dies were to be changed to my name, the respective dies. And I told him to go ahead and order, or allow the company to order material on those dies. He told me that he would have to have a letter from me giving Reynolds permission for my own company to have material run through those dies. And these are the letters pertaining to that particular event.

Q. (By Mr. Mahoney): I show you a letter to the Reynolds Metals Company directed to Glide Windows, Inc., marked Plaintiff's Exhibit 17 for identification.

Mr. Duque: May we have the date on that?

Mr. Mahoney: April 11, 1951.

Q. (By Mr. Mahoney): And I ask you if this is the actual copy of a letter received from Mr. Lewis of Reynolds Metals Company?

A. This is the letter, the original, I believe.

Q. And this is the letter requesting permission from you, as owner of the dies—— A. Yes.

Q. ——as set forth therein to permit Reynolds Metals [178] to fabricate extrusions for Glide Windows from the dies which were in your name, is that correct?

A. Well, in this last paragraph it says, "We should have as soon as possible * * *"

The Court: The letter speaks for itself, doesn't it?

(Testimony of Abraham Grossman.)

Mr. Mahoney: Yes, your Honor.

The Witness: Oh.

The Court: Is what you have there a chain of correspondence?

Mr. Mahoney: Yes, your Honor.

The Court: Why don't you have it all marked and ask him about it at one time?

Mr. Mahoney: Will you please mark these documents as Plaintiff's Exhibits 18, 19 and 20 for identification?

(The exhibits referred to were marked Plaintiff's Exhibits 18, 19 and 20 for identification.)

Q. (By Mr. Mahoney): I now show you Plaintiff's Exhibits 18, 19 and 20 for identification and ask you if you sent those letters to Reynolds Metals Company in order that the use of the dies by Reynolds Metals Company for Glide Windows, Inc., might be clear? A. Yes.

Mr. Duque: I object to the question, your Honor. I have no objection to him answering whether he sent them or received them, but what the "in order" was is calling for a [179] conclusion of the witness and is leading and suggestive. The letters speak for themselves.

Mr. Mahoney: I will rephrase the question.

Q. (By Mr. Mahoney): Are these documents, Plaintiff's Exhibits Nos. 18, 19 and 20, true copies of letters which were forwarded to Reynolds Metals Company by your company? A. They are.

The Court: On or about the dates they bear?

(Testimony of Abraham Grossman.)

The Witness: Yes.

Q. (By Mr. Mahoney): What was your purpose in sending those letters to the Reynolds Metals Company?

Mr. Duque: To which question I object, your Honor, on the grounds that the letters speak for themselves. And on the further grounds that it has been asked and answered. He explained the entire circumstances.

The Court: Sustained on the latter ground.

Mr. Mahoney: I now offer Plaintiff's Exhibits 16 through 20 in evidence.

Mr. Duque: To which offer we object, your Honor, on the grounds that the offer in evidence is incompetent, irrelevant and immaterial; it is between Glide, Incorporated, and Reynolds Metals Company; Glide, Incorporated, not being a party to this action. It relates to dies that relate to matters which apparently were patented and which require, by law, a permission for use; and for that reason has no bearing [180] on the issues in this case.

The Court: May I see the documents, Mr. Clerk?

(Whereupon, the documents were handed to the court.)

The Court: These exhibits, 16 to 20, inclusive, deal with dies for the Glide Windows?

The Witness: Yes.

The Court: Those were patented products, were they?

(Testimony of Abraham Grossman.)

The Witness: As far as the product was concerned with the Glide Window Company.

The Court: You held the patents?

The Witness: I did.

The Court: Was Glide Windows, Inc., licensed to manufacture under those patents?

The Witness: Yes.

Mr. Mahoney: Well, your Honor, it has not been shown here that there is any relationship whatsoever so far as the Reynolds Metals Company is concerned as to whether the existence of patents would influence their conduct in regard to dies.

The Court: There are some pencil markings on Exhibit 18. Do you offer those?

The Witness: No. Those aren't relative to the letter. Those scribblings are on some other matter. The copy just happened to be at hand.

The Court: What is the purpose of the offer, to show [181] the practice?

Mr. Mahoney: The purpose of the offer is to show the practice of the Reynolds Metals Company for dies which were ordered by a party and which were in the name of the party, just to show the practice of Reynolds in obtaining permission for the use of another party or for the use—for the benefit of another party by Reynolds Metals Company.

The Court: Do you expect to show other instances?

Mr. Mahoney: This is the only instance we have at the present time, your Honor, because since then

(Testimony of Abraham Grossman.)

Panaview and Glide have not given permission to any other parties to use their dies.

The Court: The objection is overruled. Exhibits 16 to 20, both inclusive, are received in evidence.

(The exhibits referred to, marked Plaintiff's Exhibits 16 to 20, inclusive, were received in evidence.)

Mr. Mahoney: Your Honor, by the courtesy of Mr. Duque, counsel for the defendant, in complete conformity in this regard with a subpoena which was issued against Mr. Yates, Mr. Duque instructed Mr. Harrison, who, I believe, is the comptroller of the Phoenix Division, to bring these records, even though they weren't available to Mr. Yates. And included in these records is the original purchase order from Panaview directed to Reynolds Metals Company, and the original acknowledgement, in pencil, with the form on the back of it, [182] paragraph 11. And I wonder if Mr. Duque would stipulate that this whole file could go in in order to prevent tearing the file apart.

Mr. Duque: I think we would rather do that, your Honor, if we may; although I have no objection to your taking these out. We can put them right back in.

The Court: Well, whatever you gentlemen desire to do. If you wish to offer the entire file it may be received.

Mr. Duque: We have no objection to them com-

(Testimony of Abraham Grossman.)

ing out of the file, your Honor. We can replace them.

The only thing I would like to state for the record is to state that it does come from our file, and that at the final conclusion of the litigation that it be returned to the defendant.

The Court: If there is no objection, why not keep the entire file together?

Mr. Duque: We have no objection to that.

The Court: Is it offered in evidence?

Mr. Mahoney: Yes, your Honor, it is offered in evidence as Plaintiff's Exhibit No. 21.

The Court: A file of Reynolds Metals Company.

Mr. Duque: We have no objection.

The Court: Very well. Exhibit 21 will be received in evidence. [183]

(The exhibit referred to, marked Plaintiff's Exhibit 21, was received in evidence.)

TIFF'S EXHIBIT NO. 21

LA-221

REYNOLDS METALS COMPA

(REV 8-64) PLEASE ENTER OUR ORDER FOR THE FOLLOWING MATERIAL AT THE PRICES AND ON THE TERMS STATED HEREON

	TERMS	CUST. ORDER NO	DATE OF CUST. ORD	PRODUCTION ORDER NO
25 Kavich	Net-30	1-583	4-30-64	

SHIP TO

PANAview
13434 RAMOS ST
North Hollywood (Calif)

SHIPPING POINT	SCHEDULE	SALESMAN REP.
Shipping Pt 211		

PPD	COL	CREDIT BY
P		R.M.S. 10/64

DESCRIPTION	PRODUCT CODE	PRICE	QUANTITY
10414A (cut [illegible])		.41	
[illegible]			
10414A (cut [illegible])		.418	
[illegible]			
10414A (cut [illegible])	98-93		
10415A (cut [illegible])		.423	
[illegible]			
10415A (cut [illegible])		.423	
[illegible]			

PAGE 2 of 4

PPD	COL	CREDIT BY

DESCRIPTION	PRODUCT CODE	PRICE	QUANTITY
10418A (cut [illegible])		.506	
[illegible]			
10418A (cut [illegible])		.110	
10419A (cut [illegible])		.325	
[illegible]			
10419A (cut [illegible])		.120	
10420A (cut [illegible])		.315	
[illegible]			
10420A			

AGE 3 of 4

DESCRIPTION	PRODUCT CODE	PRICE	QUANTITY
10415A	91 93	$15.00	
10416A	17-11-5341	$.416#	
10416A	91 93	$150.00	
10417B	17-50-6341	$.491#	4000#
10417B	91 93	$190.00	

AGE 4 of 4

DESCRIPTION	PRODUCT CODE	PRICE	QUANTITY
10421A	17-10-6341	$.460#	
10421A	91 93	$120.00	
10426A	17-11-6371	$.554#	
10426A	91 93	$120.00	only

TAX STATUS: E

99 [illegible] # AG52399

Cust. requests shipment June 13th or before

[illegible] same

CHECK IMPORTANT QUALITY FACTORS WHICH MERIT SPECIAL ATTENTION
☐ THICKNESS ☐ DIAM ☐ WIDTH ☐ DRAWING ☐ NON-EARING ☐ WORKABILITY ☐ FLATNESS ☐ OIL FREE
☐ STAIN ☐ LENGTH ☐ SQUARENESS ☐ ROUNDNESS ☐ BRIGHTNESS ☐ EDGES ☐ SURFACE ☐ REQ. ONLY ONE GOOD SIDE

NUMBER OF BLOCKS IN SEQUENCE OF FABRICATING OPERATIONS
☐ BLANK ☐ MACHINE ☐ ROUTE ☐ SAW ☐ SHEAR ☐ TRIM

BEND ____ TANGENT FORMING ☐ ROLL ☐ BREAK ☐ STRETCH ☐ CURL ☐ MACHINE ☐ FORGE ☐ SPIN
DRAW ____ DEPTH ____ NO ____ BEND RADIUS ____ °DEGREE OF BEND ____
WELD ☐ TORCH ☐ ARC ☐ SPOT ☐ SEAM ☐ BUTT BRAZE ☐ TORCH ☐ DIP ☐ SOLDER ☐ ORGANIC CEMENT
MECHANICAL ☐ RIVET ☐ BOLT
CLEANING ☐ CHEMICAL ☐ SOLVENT ☐ VAPOR ☐ CAUSTIC ETCH ☐ ACID ETCH COATING ☐ ANODIC ☐ PHOSPHATE
☐ PLATE ☐ PAINT ☐ ENAMEL ☐ LITHOGRAPH ☐ POLISH ☐ SCRATCH BRUSH ☐ HAMMER ☐ SAND ☐ TUMBLE

RUSH
TIME [illegible]

CHECK
☐ RENEG ____ % ☐ VIN ____
☐ WALSH HEALEY ☐ B MR ☐
☐ VALUE OF COMBINED GOVT CONT

S NOT BINDING UPON SELLER UNLESS AND UNTIL ACCEPTED [illegible] THIS ORDER IS GIVEN
ED IF ACCEPTED BY SELLER WILL BE FILLED BY SELLER U[illegible] HEREBY EXPRESSLY MADE A

BY _____
COMPANY NAME TITLE

(Testimony of Abraham Grossman.)

[Terms and Conditions of the foregoing Order are identical to those that appear as part of Plaintiff's Exhibit No. 2—see photostat pages 91 and 92 of this printed record.]

Received in evidence November 22, 1955.

Mr. Mahoney: Your witness.

The Court: And I assume, of course, that stipulation includes the stipulation that the documents therein are all genuine and in all respects what they purport to be?

Mr. Mahoney: We so stipulate since it was produced in good faith by the defendant.

The Court: Very well.

Mr. Duque: So stipulated.

I have no questions.

The Court: Very well. You may step down, Mr. Grossman.

(Witness excused.)

The Court: The plaintiff's next witness?

Mr. Mahoney: I call Mr. Pinson.

LOUIS PINSON

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Louis Pinson, L-o-u-i-s P-i-n-s-o-n.

Direct Examination

By Mr. Mahoney:

Q. Mr. Pinson, what is your full name?

A. Louis Pinson. [184]

Q. And are you associated with the plaintiff, Panaview Door & Window Co.? A. I am.

Q. In what capacity are you associated with the plaintiff?

A. I am the assistant to the general manager and assistant secretary of the corporation.

Q. In your capacity as assistant general manager and as assistant secretary of the corporation, do you have custody of the records of the corporation? A. I do.

Q. Do you supervise the production of the products of the corporation? A. I do.

Q. Have you supervised the production of the Panador sliding door for the corporation?

A. Yes, I have.

Q. And do you supervise the obtaining of materials for the products of the corporation?

A. Yes.

Q. Have you supervised the obtaining of aluminum extrusions from Reynolds Metals Company for the Panador sliding door? A. Yes, I have.

(Testimony of Louis Pinson.)

Q. And have you, in the period between November, 1954, [185] and June, 1955, encounter difficulties in obtaining complete balanced shipments of extrusions from Reynolds Metals Company for the Panador sliding door?

Mr. Duque: To which I object on the grounds that it calls for the conclusion of the witness as to what is "encountering difficulties." I have no objection to him stating what occurred.

Mr. Mahoney: I will rephrase the question.

Q. (By Mr. Mahoney): Have incomplete shipments and unbalanced shipments of aluminum extrusions from the Reynolds Metals Company and intended for the Panador sliding door, been shipped to Panaview?

A. Yes, both incomplete and unbalanced shipments have been.

Q. Will you explain what the difference between an incomplete and unbalanced shipment is?

A. An unbalanced shipment is one which, in essence, allows us, or does not allow us to complete a door.

And an incomplete shipment is one, which, in our own terminology, would allow us to make a limited number of doors but not as many as the order called for.

Q. Now, when you have received shipments lacking certain essential extrusions, what is the effect of this upon your production?

A. The effect is that it hampers our production, [186] reduces the efficiency of our operation

(Testimony of Louis Pinson.)

and curtails our ability to ship complete units to our customers.

Mr. Mahoney: Would you please mark this as Plaintiff's Exhibit No. 22 for identification?

(The exhibit referred to was marked Plaintiff's Exhibit 22 for identification.)

Q. (By Mr. Mahoney): I show you Plaintiff's Exhibit No. 22 for identification, which is a letter dated March 30, 1955, directed to Mr. Miles of the Reynolds Metals Company, and ask you if that is a true copy of a letter written by you, and obtained from your files, on or about that date?

A. Yes, this is a copy of the letter sent on or about that date.

Mr. Mahoney: Would you please mark this as Plaintiff's Exhibit No. 23?

(The exhibit referred to was marked Plaintiff's Exhibit 23 for identification.)

Q. (By Mr. Mahoney): I show you Plaintiff's Exhibit No. 23 for identification, which is a letter dated April 13, 1955, directed to the Reynolds Metals Company at Richmond 18, Virginia, signed by L. Pinson, and ask you if that is a true copy of a letter extracted from your files which was forwarded to the Reynolds Metals Company on or about that date?

A. That is a true copy. [187]

Q. Now, Mr. Pinson, during the period in which these letters were written, were you encountering

(Testimony of Louis Pinson.)

a series of difficulties with the shortage of orders and the fact that——

Mr. Mahoney: I will rephrase that.

Q. (By Mr. Mahoney): Mr. Pinson, during the period during which these letters were written had the fact that there were shortages of extrusions in orders delivered by Reynolds hampered your production? A. Very much so, yes.

Q. And were you, therefore, unable to complete shipments to customers of knocked-down Panador aluminum frame sliding doors?

A. In many instances, yes.

Q. Now, Mr. Pinson, you have previously testified that you have custody of the records of the Panaview Company. Do you also have custody of the financial records of that company?

A. Yes, I do.

Q. And do you supervise the payment of the bills of that company as evidenced by invoices directed to that company by its suppliers?

A. On behalf of Mr. Reznick, yes, I perform that function.

(Whereupon, there was a conference between counsel outside the hearing of the court.) [188]

Mr. Duque: Will you bear with us, your Honor, just a moment, please?

The Court: Yes.

Mr. Mahoney: Your Honor, we have here a sheaf of invoices, together with a statement of Reynolds Metals Company in the sum of $15,281, to which

(Testimony of Louis Pinson.)

was added a few sums which raised the total to $15,944. Now, the invoices are scattered throughout the pertinent die charges and indicate that these charges were made to Panaview. And there is evidence by this copy of the check forwarded to Reynolds Metals that these invoices were paid.

Now, to avert burdening the record I have suggested to Mr. Duque that during the recess Mr. Pinson and one of my client's representatives could go over these and stipulate that the die charges were made by these invoices, that the check was presented in payment for the die charges to show performance by the plaintiff of its obligation under this particular purchase order.

The Court: Very well.

Mr. Mahoney: So we will then do this during the recess period.

The Court: Would you prefer to take the recess at this time?

Mr. Mahoney: Yes, that would be fine.

Mr. Duque: It might expedite things, your [189] Honor.

The Court: The court will be in recess, subject to call. You let the clerk know when you are ready to proceed.

(Short recess.)

Mr. Mahoney: Your Honor, the invoices have been reviewed by the representatives of the plaintiff and the defendant, and counsel for the plaintiff and defendant are willing to stipulate that the total sum

(Testimony of Louis Pinson.)

of $1430 was paid by the plaintiff to the defendant as die charges under the purchase order which incorporated said die charges. Is that correct?

Mr. Duque: That is correct, your Honor; without stipulating as to the nature of those charges.

The Court: In other words, the stipulation is that the plaintiff paid the defendant $1430 as charges——

Mr. Mahoney: On the dies.

The Court: ——in connection with the dies. Is that it? And paid all the charges defendant made. Is that it?

Mr. Duque: Yes, your Honor. The amount that is set forth in the stipulation of facts is the same amount, and we are stipulating that that amount has been paid, without stipulating as to the nature of the charge.

The Court: And those charges were all the charges which the defendant made on account of dies?

Mr. Duque: Yes, your Honor.

The Court: Is that agreed, Mr. Mahoney? [190]

Mr. Mahoney: That is agreed.

Mr. Duque: The defendant is also willing to stipulate that in one of its Panaview files there appears an internal production order dated April 20, 1954, relating to extrusions to be made for the Panaview corporation, the plaintiff here, and that on the bottom of said order there appears the following:

(Testimony of Louis Pinson.)

> "4. Sliding doors — these are components parts so be sure and ship all sections at same time."

The defendant is further willing to stipulate that this portion of the production order is an internal portion of the order and does not appear in any documents which are sent to the plaintiff.

Mr. Mahoney: So stipulated.

The Court: Very well.

Q. (By Mr. Mahoney): Mr. Pinson, are you, in your position as assistant secretary and assistant to the general manager of Panaview, familiar with the costs of producing the Panador aluminum sliding door? A. Yes, I am.

Q. And have you recently made a survey of the costs of producing the Panador sliding door?

A. Yes, I have.

Mr. Mahoney: Would you please mark this as Plaintiff's [191] Exhibit No. 24?

> (The exhibit referred to was marked Plaintiff's Exhibit No. 24 for identification.)

Q. (By Mr. Mahoney): I show you Plaintiff's Exhibit No. 24 for identification and ask you if this is a compilation of the production costs and the costs of the various materials which are utilized in fabricating the Panador aluminum sliding door?

A. Yes, this is such a compilation. It includes the labor and material costs.

Q. Now, do you have embodied in this cost data

(Testimony of Louis Pinson.)

the total cost for the extrusions as received from Reynolds Metals Company?

A. Yes, I do have.

Q. Where is that cost to be found?

A. That is on the first of the two pages of the document at the top. The extrusions used in the typical or bench-mark doors set up for the purposes of this study are parts Nos. X-1 through X-7, and they are separated from the rest of the component parts, and the total cost of those extrusions follows down a line called or headed "Total Cost."

Q. And the sum total of $17.80 is the total cost of the raw extrusions as received by Panaview from Reynolds Metals Company?

A. That's correct. [192]

Q. And when you received those extrusions from Reynolds Metals Company are they cut to size or in any way fabricated? A. No.

Q. And in your plant do you cut the extrusions to size, punch the holes, nail the various slots and generally fabricate the same?

A. We perform all the fabrication operations, yes.

Q. Is there a list here of the total cost of the various auxiliary parts which are supplied and applied to the extrusions after you have fabricated the extrusions, preparatory to the installation of these auxiliary parts?

A. Yes. That list begins just under the extrusion list and continues over to the second page.

Q. And what is the total cost of the additional

(Testimony of Louis Pinson.)

components? A. $8.145.

Q. And where do your labor costs for both punching, drilling, and otherwise manipulating and forming the extrusions and also for making the various installations of the auxiliary in the extrusions prior to shipment appear?

A. Those costs appear as an extended column in the form of "Labor Hours" on page 1, with the cost for each separate extrusion extended on the line that that extrusion cost is placed on. Then at the bottom of the column "Labor Hours" they are totaled and we found that there was a total [193] of .890 labor hours, what we call standard hours, involved in the production of one Panador door.

Q. Now, Mr. Pinson, I note that this "Labor Hours" appears on the first page. Do you have any figure for the installation of the various auxiliary parts such as the rollers and——

A. Well, the standard hours for the installation of all of these parts, all assembly operations, are figured in against the particular extrusion, which is finally assembled.

Q. Now, from this record are you able to determine which involves the greater cost, the installation of the various small auxiliary parts or the various auxiliary parts, or the fabrication of the extrusion after it reaches your plant?

A. Well, from this particular record I could not determine that. But I am well aware of the relative costs between fabrication, primary fabrication and assembly operations.

(Testimony of Louis Pinson.)

Q. How would you define "primary fabrication"?

A. Primary fabrication is the preparation of the extruded part for all of the assembly operations which go into it.

Q. And the "assembly operation," how would you define that?

A. The assembly operations are bench operations [194] which involve the insertion or attachment of small parts to the basic extrusion.

Q. And what percentage of the labor cost, from your experience, is allotted to the primary operations?

A. From my experience, the percentage would be at least 80 per cent.

Q. And, therefore, only 20 per cent of the labor operations is devoted to the installation of such auxiliary parts as bumpers, rollers and the like?

A. At a maximum of 20 per cent, yes.

The Court: 20 per cent on a given door would be the figure you gave us?

The Witness: Yes.

The Court: Some eight-tenths of an hour?

The Witness: Actually, about nine-tenths of an hour, and 20 per cent of that would be represented by sub-assembly operations.

The Court: So is it fair to assume then from the time you receive the extrusions from Reynolds until the time you have the knocked-down door assembled ready for shipment that some five hours of labor is expended on it?

(Testimony of Louis Pinson.)

The Witness: Oh, no, your Honor. I am sorry. Only nine-tenths of an hour, a shade under nine-tenths of an hour is expended on each individual door.

In other words, this represents the entire amount of [195] labor which has gone into the fabrication and sub-assembly involved in the door. 20 per cent of this nine-tenths of an hour is represented by the sub-assembly.

The Court: Yes. I understand it now.

Q. (By Mr. Mahoney): In other words, it would take approximately 10 to 12 minutes to install the various auxiliary components?

A. That would be about right.

Q. Once the extrusions have been punched and otherwise manipulated in the plant? A. Yes.

Q. Now, you have a figure here in the column which says "At 100% Standard" of 1.42, and another column which says "(50 Door Run) at 60% Standard" a figure of 2.36. What does that mean?

A. Well, let me explain that the period covered by this analysis is during the period of the fall of 1954. Our average wage in the Panador division at that time was $1.59 per hour. The nine-tenths of an hour, or the .890 of an hour at $1.59 would represent a cost of $1.42.

Q. By "cost," you mean labor cost?

A. Labor cost, providing that we were operating at 100 per cent of standard.

While this operation is greatly to be desired, if we found our efficiency in any way impaired we

(Testimony of Louis Pinson.)

would not be [196] able to make it, and we found that in the real truth of the matter our production more nearly averaged 60 per cent of standard, which meant that we found our cost was $2.36 labor cost per door.

Q. In your experience is it common to run a plant with 100 per cent efficiency as far as labor costs are concerned?

A. No. It is virtually unknown unless you have what is called an incentive plan to stimulate the workers to try to better the standard.

Q. Does the 60 per cent of standard indicate an inefficient operation?

A. No. It is a pretty fair efficient operation. And we felt that, considering the supply difficulties that we had during the course of this run, it was quite good.

Q. Now, did you have any further costs on packaging or shipping of the door?

A. Yes. We had an additional labor cost of 37 cents for the packaging. This was based on our own experience. It was not applied on the standard hour basis.

Q. And where is the cost of the cartons set forth?

A. The cost of the carton is set forth under the list of components along with other components of the finished package, such as the cloth bag and the paper bag which we use. [197]

Q. Now, where have you totaled the entire cost

(Testimony of Louis Pinson.)

to Panaview Door & Window Co. of a Panador aluminum sliding door?

A. Well, first, let me say we have totaled the cost of the components, including the extrusions, under the "total cost" column where you will find the figure of $25.94.

Extended to the right three columns over you will find a cost of $27.73, which would represent our cost at 100 per cent of standard. Two columns farther over to the right you will find the cost figure of $28.67½, which represents our total cost per Panador at 60 per cent of standard.

Q. Now, when you speak of the production of the Panador, and you refer to the figures indicated in this exhibit entitled "Panador Cost Data," does this represent the entire run of Panadors? Or have you made a selection of typical Panadors?

A. This represents a typical run. We regard an efficient or an economic run of 50 doors as being desirable. And this represents a 50-door run, and is based in truth upon actual plant experience over this period of time.

Q. What period of time is that again?

A. The fall of 1954.

Q. And does this cost data cover all sizes of the Panador?

A. No. For the purpose of establishing a standard, [198] and rather than having a large number of figures, we felt that since the very substantial majority of the doors sold by us were in the 8.0 x 6.10 size that it would very well average out

(Testimony of Louis Pinson.)

by using the 8.0 x 6.10 size as our standard or bench-mark in order to establish our basic unit cost.

Q. Now, Mr. Pinson, have you been able to determine from your records the number of, or, the total sales volume of Panador business from the time at which you began business in 1954 through December, '54, and in 1955 from January through June, inclusive? A. Yes, I have.

Q. Have you consulted, or had an employee consult records of the corporation to determine the figures in that regard?

A. Yes. I gave this as a project to the bookkeeping department.

Mr. Mahoney: Would you please mark this document as Plaintiff's Exhibit No. 25?

(The exhibit referred to was marked Plaintiff's Exhibit 25 for identification.)

Q. (By Mr. Mahoney): I show you Plaintiff's Exhibit No. 25 for identification and ask you if this is a true summary, made under your supervision, of the total sales figure of the Panador Aluminum frame sliding door?

A. Yes, this is a summary. It is addressed to me [199] in the form of a memorandum from the girl who actually performed the operation. It is a summary only. We have detail to support it.

Q. Mr. Pinson, during the period extending from the initiation of the sale of the Panador in 1954, up and through June 30, 1955, could your

(Testimony of Louis Pinson.)

company have manufactured additional Panadors if there were sales for the Panador?

Mr. Duque: To which question I object on the grounds that it is incompetent, irrelevant and immaterial; doesn't tend to prove any issue in this case. It is conjectural, speculative and remote.

Mr. Mahoney: Your Honor, we are trying to prove by the answer that the company, the Panaview corporation, had available to it facilities which would have enabled it to produce larger numbers of doors if the sales for such doors had been available to it.

The Court: Well, why not go at it this way: Ask him what they were producing and ask him what the capacity was at the time. And then we can perform the mathematics in argument.

Q. (By Mr. Mahoney): Mr. Pinson, in your recent consideration of the records of the corporation have you determined the approximate number of doors which were produced in the period from January, 1955, through June 30, 1955?

A. Yes, I have. Not approximate. We have determined [200] exactly the number of doors were produced.

Q. Can you recall what that number was?

A. I don't have it here in front of me. But it was between 4125 and 4150 units.

Q. And could your company have produced a larger number than 4150 units during that period of time?

Mr. Duque: To which question I object on the

(Testimony of Louis Pinson.)

grounds that it is incompetent, irrelevant and immaterial as to what they could have produced during that period of time. There is no issue here—there has been no connection shown between what they can produce and what we had to do with it.

The Court: It is an element of the proof of damage.

Why don't you ask him what the capacity of the plant was during this period?

Q. (By Mr. Mahoney): What was the capacity of the plant of the Panaview Door & Window Co. which was allotted, and can be allotted to the production of the Panador, and could have been allotted to the Panador during the period mentioned?

A. Our plant capacity was based upon our tooling and our labor force and was approximately 1500 units per month, slightly more than double our 700 units per months of actual production during this period of time.

Mr. Mahoney: I now introduce into evidence Plaintiff's Exhibits 22 through 25. [201]

Mr. Duque: You mean you offer them?

Mr. Mahoney: Yes.

Mr. Duque: I object to them, your Honor, on the grounds that they are not the best evidence. They are incomplete, and they do not show the true condition of the records of the Panaview company, the plaintiff in this action.

The Court: Well, in what respect is the foundation lacking. Foundation records are available for——

(Testimony of Louis Pinson.)

Mr. Mahoney: The records are available.

The Court: ——Exhibit 24 and Exhibit 25 for identification, if you wish to see them.

Is that the ground of your objection, that the supporting data has not been produced?

Mr. Duque: That's correct, your Honor. I never saw this before in my life. It could be correct, and it could not be. But——

The Court: Are the supporting data available?

Mr. Mahoney: Yes, your Honor, the supporting data are available.

The Court: Are they in court?

Mr. Mahoney: No, they are not in court.

Q. (By Mr. Mahoney): Mr. Pinson, could you produce the supporting data for this summary?

A. Yes, I could.

May I explain, your Honor, that the supporting data for [202] the summary of our cost is voluminous to say the least. I can produce it. It is based on inventory cost data, item 1, and item 2, it is based upon, also, upon time standard studies which were conducted and performed in our plant, all of the material which I have in my possession.

The Court: Let's see Exhibits 22, 23, 24, and 25, Mr. Clerk.

(Whereupon the documents were handed to the court.)

The Court: Exhibit 22 appears to be a carbon copy of a letter dated March 30, 1955, by L. Pinson to Mr. Miles of the Reynolds Metals Company. Pre-

(Testimony of Louis Pinson.)

sumably, if the letter was sent, your client has the original, Mr. Duque.

Is there any objection to that upon the ground that it is not the best evidence?

Mr. Duque: Your Honor, I have forgotten even what that letter is.

The Court: Mr. Clerk, will you show it to counsel?

(Whereupon the document was handed to counsel.)

The Court: Exhibit 23——

Mr. Duque: Oh, no, your Honor. I have no objection to that.

The Court: Very well. Exhibit 22 for identification is received in evidence.

(The exhibit referred to, marked Plaintiff's Exhibit 22, was received in evidence.) [203]

The Court: Exhibit 23 appears to be, in like manner, a copy of a letter addressed, under date of April 13, 1955, by Mr. Pinson to the attention of T. G. Redford, Assistant Credit Manager of the Reynolds Metals Company. Is there objection to that letter?

Mr. Duque: I am sorry, your Honor.

The Court: That is the same type of situation, Exhibit 23 for identification.

Mr. Duque: Yes, your Honor. I have objected to this, I think, on the ground that it is immaterial, and I renew that objection. I have no objection to its authenticity.

(Testimony of Louis Pinson.)

The Court: The objection is overruled. Exhibit 23 for identification is received in evidence.

(The exhibit referred to was marked Plaintiff's Exhibit 23 and received in evidence.)

The Court: That leaves the objections to Exhibits 24 and 25 for identification, which at the present must be sustained until a better foundation is laid.

Mr. Mahoney: Does Mr. Duque desire that we place in evidence all of these voluminous records? Or does he desire that an accountant——

Mr. Duque: I have no desire to burden you with bringing them all into court here if the records can be made available to somebody from Reynolds and he can look at them and try to verify some of these figures. [204]

The Court: Are there any further questions of Mr. Pinson at this time?

Mr. Mahoney: We have one further line of questioning with Mr. Pinson.

Q. (By Mr. Mahoney): Mr. Pinson, have you recently investigated the average price at which the plaintiff has sold Panador aluminum sliding doors during the period from its initiation of its operations in 1954 to, and including, June, 1955?

A. Yes, I have.

Q. And have you derived an average figure for the total sales volume of the Panador aluminum frame sliding door?

(Testimony of Louis Pinson.)

A. Yes, I have. Again I do not have that figure here before me, but it is in the neighborhood of $62 or $63.

Mr. Duque: Now, just a moment. Before you start naming any figure, may I interpose my objection? I object to this on the ground that it is not the best evidence. It is conjectural. He doesn't have any figures before him in the courtroom. And he is talking about an approximate figure.

Mr. Mahoney: Well, we will produce, for the benefit of Mr. Duque, all of the records pertaining to costs and sales price.

The Court: Anything further from this witness?

Mr. Mahoney: No, your Honor. [205]

The Court: Any cross-examination?

Mr. Duque: Just one question, your Honor.

The Court: I was going to suggest that some representative of the defendant go with the witness wherever these records are and examine them this evening, and it can be done.

Mr. Mahoney: That would expedite the action, your Honor.

The Court: And you may wish to defer your cross-examination.

Mr. Duque: Well, the only cross-examination I was going to ask him about was with regard to the correspondence at this time, your Honor. But I can defer that until he gets back.

The Court: It might be better to send him on if he can go now, some representative of the defendant, and make this examination.

(Testimony of Louis Pinson.)

Mr. Duque: Very well, your Honor.

The Court: Can you take some representative of the defendant now?

The Witness: Yes, your Honor. May I say that I believe I have supporting data for that memorandum——

The Court: Of course, your problem, I take it, is to satisfy whoever represents the defendant in this matter, and if he is satisfied, whatever it takes to satisfy the defendant's representative will be the answer. It may be much or it may be little. So you may step down and embark upon that [206] undertaking, if you will.

The Witness: Thank you.

(Witness excused.)

Mr. Mahoney: Would you like to delegate——

Mr. Duque: Mr. Hairston will be happy to accompany Mr. Pinson to wherever the records are.

The Court: It may be that Mr. Pinson might have the answer in his briefcase. But these gentlemen can work it out, I am sure.

Mr. Duque: Mr. Hairston is the comptroller of the Phoenix plant. And if the court will excuse him from testifying this afternoon——

The Court: Yes.

Mr. Duque: ——he will be back in the morning.

May I explain to Mr. Hairston what the problem is, your Honor?

The Court: Yes, if you will.

Mr. Mahoney: Would the court like to declare a recess while this is going on?

The Court: Do you wish a recess?

Mr. Mahoney: No, your Honor.

The Court: The plaintiff's next witness?

Mr. Mahoney: One moment, your Honor.

Your Honor, the plaintiff will rest here, subject to laying a foundation for the testimony of the witness, Pinson, [207] as to Exhibits 24 and 25, and as to the sales figure.

The Court: Very well. And as to the average sales price. So the objections to those three items at this time will be sustained with the privilege of the plaintiff to reopen the case in chief to supply the foundation.

Mr. Duque: At this time, your Honor, the defendant moves for an involuntary dismissal of this action under Rule 41(b), without waiving its right to offer evidence in the event the motion is not granted.

The motion is made upon the ground that upon the facts and the law the plaintiff has shown no right to relief in the within cause. This action, your Honor, as set forth in the complaint is an action containing three causes of action. The first cause of action is for an alleged breach of contract. And the complaint alleges that there was a contract whereby the defendant agreed to use the dies which it made for the production of plaintiff's extrusions for the Panador exclusively for the plaintiff, and for no other person. And they rely upon paragraph

11 of the Acknowledgment, which is in evidence in this action as Exhibit 5, Plaintiff's Exhibit 5.

We have heretofore filed with your Honor a memorandum regarding that Acknowledgment, and it is quite apparent to me, and I assume that it must be quite apparent to your Honor, that the Acknowledgment is not a contract to make [208] dies or to produce extrusions exclusively for the plaintiff. It is an Acknowledgment which simply says that if any dies, jigs or other equipment are made specifically and solely for the plaintiff's use, then and in that event such dies, jigs and other equipment will remain the property of the defendant and will be under defendant's sole and exclusive control and possession. That is all it says. It does not say under any circumstances that we will only use the dies for the production of extrusions or extruded shapes for plaintiff. Nowhere in paragraph 11 can that be seen.

The evidence in this case, on plaintiff's evidence, further shows why that must be true. There is in the record in this case another memorandum or an acknowledgment which was used in 1951, and that does say in precise language, your Honor, that the dies which are made for the customer will be used only to produce extrusions for the customer. That was changed, and between the time of 1951 and 1955, or 1954 there was a completely different agreement, Reynolds had prepared a completely different acknowledgment with relation to the production of extrusions.

If your Honor will read the one, it is precise

and explicit, which indicates that certainly Reynolds Metals knows how to prepare an acknowledgment, which says that when they produce dies they will be for the exclusive use of one customer. [209]

The Court: Where is the old form, the 1951 form?

Mr. Duque: The 1951 form, your Honor?

The Court: Is it in evidence here?

Mr. Lydick: Exhibit No. 5, your Honor.

The Court: May I see it, Mr. Clerk?

(Whereupon the document was handed to the court.)

Mr. Duque: The old form, your Honor, is Exhibit 2. Rather, the 1954 form is Exhibit 2.

The Court: The 1954 form is set forth in the complaint, is it not?

Mr. Duque: That is correct, your Honor.

The Court: In paragraph—I had it here a moment ago—paragraph 3, the first cause of action.

Mr. Duque: That's correct, your Honor.

The Court: Now, I have before me paragraph 5. Where does that appear? I mean I have Exhibit 5. Is it paragraph 11? It is paragraph 12.

Mr. Duque: It is paragraph 12, your Honor, in Exhibit 5, which is the same as paragraph 11 in Exhibit 2.

The Court: The first sentence appears to be substantially the same in both paragraph 12 of Exhibit 5 and paragraph 11 of Exhibit 2. The first sentence of paragraph 12, Exhibit 5, rather, appears to comprise the same expressions as are comprised

within the first two sentences of paragraph 11 of Exhibit 2. [210]

You contend that the crucial sentence which is omitted from paragraph 11 of Exhibit 2 is the third sentence, or the second sentence of paragraph 12 of Exhibit 5 which reads that:

> "* * * all such equipment shall be used exclusively for the manufacture of products for buyer"?

Mr. Duque: That's correct, your Honor. That is entirely absent from the acknowledgment upon which the plaintiff relies in this action as being a contract for the exclusive use of these dies.

Paragraph 11 of Exhibit 2 has no indication, no statement, nothing in it whatsoever that we will use the dies exclusively for extrusions to be made for the plaintiff; while Exhibit 5, paragraph 12, specifically states it.

So it must be apparent, not only from the reading of paragraph 11, if your Honor please, but from the comparative reading with paragraph 12 of Exhibit 5 that a change took place in that period of time.

The Court: I have that point.

Mr. Duque: Very well. So I submit, your Honor, that there is no contract for the exclusive use of the dies existing between this plaintiff and this defendant.

I further submit that even if there had been a contract, and even if your Honor were to interpret

paragraph 11 of Exhibit 2 as being an exclusive use contract, there still can [211] be no damage accruing to these plaintiffs for the reason that the evidence shows here that the identical door that they were producing for Windsor was taken by Windsor to Reynolds, and the identical extrusions were made by Reynolds. That door was in the open market. It had been sold by Windsor to Fuller for some period of time. It was in the public domain. There was no patent right to it. There was no property right in it. Anybody, whether it be Windsor, A Corporation, B Corporation, could have taken the Panador, which was supposed to have all these secret and unique features to it, taken that door, broken it down, reproduced it and there would have been no conceivable cause for damage to the person that did it.

So, even assuming that your Honor does interpret this paragraph 11 as a contract for exclusive use, which I submit it cannot be, but even for the purpose of the argument, if it were to be tortured into that kind of an interpretation, what conceivable damage has the plaintiff in this action suffered by reason of the acts of the defendant in its alleged breach of contract? It is injury without damage, your Honor. I mean, it could have been done by anybody. And I am not talking about the breach of contract only.

Assuming for the purpose of the argument that there was a contract for exclusive use, and assuming that we breached a contract and made dies and produced extrusions out of the [212] same dies for

Mr. A, Corporation A, or Corporation B, anybody in the trade, anybody in the business could have done the same thing because that door was out on sale; it was being sold by Panaview to Windsor, who in turn sold it to Fuller. And Windsor was producing the door for Fuller. So it is in the public domain. There is no patent. There is no copyright. There can be no injury.

Now, to pass on to the second cause of action. They allege a breach of trust and confidence, of a confidential relationship. I ask your Honor to scan the record in this case to find one bit of evidence which shows any conceivable relationship of trust or confidence. The only thing that was done, the only testimony there is in this record is the testimony of Mr. Grossman that he met with Mr. Sargeant and he told Mr. Sargeant that they were going to come out with a new door and didn't want their competitors to know about this new door that they were bringing out, and would Mr. Sargeant please not tell the competitors.

He also says that he told that to Mr. Kavich. There isn't a word of testimony in the record about any agreement between Panaview and Reynolds Metals as to the exclusive, secret, unique character of this door; nor is there anything in the record that we have ever disclosed that to anyone. There is no evidence in this record that we have ever breached any trust or breached any confidence or have shown any [213] drawings or shown to Windsor any drawings or extrusions or anything else that we were not supposed to have shown. The only

trust and confidence, supposedly, in this entire record is what when they thought they were going to bring out the Panador they didn't want their creditors to know about it so they said to Mr. Sargeant and they said to Mr. Kavich, "Look, we are bringing out this new door. We think it's a fine door and we think it's competitive and sells for less * * *" and so on and so forth. "Would you please not tell any of our competitors about it so we can bring it out on the market without them knowing about it."

That is the only conceivable theory, judging from the evidence that has been produced here, upon which plaintiff can rely. And there is no evidence that that has ever been breached. Nobody has here testified, nor can they ever testify, that Mr. Sargeant went out and told the competitors of Panaview that they were coming out with a new door and that it was going to have this and it was going to have that feature and was going to have a—going to be lighter and cheaper and so forth and so on. There is no evidence of that any place in the record, your Honor.

The plaintiff has failed to produce, first, any relationship of trust and confidence between the parties; and second, any breach of the relationship of trust and confidence. As your Honor knows, and as the cases which we cite in our [214] memorandum show, you can't establish a relationship of trust and confidence just by saying, "I establish with you a relationship of trust and confidence." I mean, that isn't what the law says. You have to have a factual situation arise whereby the court can determine

from the facts that one person relied, trusted and had faith in another person and that the other person breached that faith.

Now, I say——

The Court: Well, is that all there is to it? Must not the person in whom the trust is reposed know that the trust is being reposed in him?

Mr. Duque: He must know that the trust is being reposed upon him, or in him; and knowing that he must, with that knowledge, go out and breach that confidence or breach that faith or breach that trust.

There has been talk in this courtroom about fraud, about all sorts of things that were supposed to have been done by Reynolds Metals Company. But insofar as factual concrete evidence is concerned, if the court please, there is not one bit of evidence that Reynolds Metals has done anything in this case that it was not supposed to do or that it was not required to do in its business. It deals with many customers. It makes extruded parts for many customers. It can't favor one customer over another. It didn't know if Mr. Grossman had a feeling inside of his heart that he was [215] reposing trust and confidence in somebody. Mr. Sargeant couldn't guess that. And there is no evidence that Mr. Sargeant did guess it or that he ever breached it.

So I submit that the cause of action with regard to the breach of trust and confidence, your Honor, is completely without any evidence to support it.

To pass to the third cause of action, the unfair

competition, I won't dwell on that long because insofar as the evidence in this case is concerned there is absolutely no evidence of unfair competition as that term is defined in the cases.

There is no evidence of any palming off; there is no evidence of any secondary meaning having been acquired. There is nothing in this record that shows any unfair competition, or in fact any competition. The witness that was called by the plaintiff from the Windsor Supply Company verified that point completely. He testified, and there has been nothing contrary in the record, that at no time, so far as he knew, did the Windsor Supply Company, or the Windsor Manufacturing Company ever receive any knocked-down manufactured doors ready for sale to the public from Reynolds Metals. We have never competed with them. The Reynolds Metals Company hasn't been in that field. And that is the fact. And if called upon to put on a case we will prove without any question of a doubt that that is [216] the fact.

So to say that the Reynolds Metals Company is in the business of producing assembled knocked-down doors for resale to the public is just false. It isn't true. So we are not in competition. We have never been in competition. Our parts division did sell to Windsor Manufacturing Company and to Windsor Supply milled extruded shapes, which shapes were taken by Windsor in bundles, matched, put together, the component parts were added to them, a knocked-down door was assembled, put in a package and sold to the public under the Wind-

sor label, and it was the same door as the Panador. Their lawsuit is against Windsor and not against Reynolds Metals Company. We haven't done anything to compete with them or create any unfair competition in this field. And I submit on the third cause of action, your Honor, there must be a dismissal because there is no evidence which could possibly support it.

In summary I submit, your Honor, that there is no contract. We admit the acknowledgment. We have admitted it in our affidavits.

The Court: Mr. Duque, I don't like to cut you short here, but——

Mr. Duque: Well, I am about finished.

The Court: I heard your motion. The plaintiff hasn't rested. He rested only subject to condition with respect to Exhibits 24 and 25 for identification, and also with respect [217] to the average sales price.

So I couldn't rule on the motion, strictly speaking, and the motion wouldn't properly lie, until plaintiff has rested.

And, in the second place, on this motion the court must not only take the evidence most favorable to the plaintiff, but must indulge every presumption within the bounds of reasonableness in addition and in favor of the plaintiff's case.

Mr. Duque: I appreciate that, your Honor.

The Court: It seems to me that I should deny the motion when it's right for that ruling, and hear the evidence on the other side.

Mr. Duque: Very well, your Honor.

The Court: And I make that suggestion now in the interest of time.

Mr. Duque: Very well, your Honor. We will proceed.

The Court: Do you wish a recess before calling your first witness?

Mr. Duque: No, not unless your honor or counsel wishes one. And the reporter. I think the reporter probably wishes it more than any of us.

The Court: We will take a five-minute recess.

(Short recess.)

Mr. Duque: May I proceed, your Honor?

The Court: Yes. The pending motions for dismissal will [218] be denied.

Mr. Duque: Now, some mention was made, your Honor, earlier in the trial as to the use of the affidavits to expedite the trial and the testimony.

The Court: Yes. Before you proceed, may it be stipulated, gentlemen, that the defendant's motion for dismissal be deemed made upon the close of the plaintiff's case in chief and denied?

Mr. Mahoney: So stipulated.

The Court: Without the necessity of repeating it when the plaintiff does formally close its case.

Mr. Duque: So stipulated.

The Court: Very well. It will be so ordered.

Mr. Duque: Now, your Honor, some mention was made early in the trial as to the use of the affidavits which were filed in connection with the

motion for preliminary injunction, for the purpose of expediting the testimony.

Does your Honor believe it would expedite the presentation of the defendant's case if I offered the affidavit of each deponent in evidence and, after a few preliminary questions, turn the witness over to the plaintiff for cross-examination? Or would it be your Honor's wish that I take the witness right down through the testimony?

The Court: I think it will save time, pursuant to stipulation, just to offer the affidavit pro tanto as the direct [219] testimony. If you will offer each affidavit now that you intend to offer for that purpose, then that will give the plaintiff an opportunity to prepare cross-examination.

Mr. Duque: Very will. I will offer——

The Court: Maybe the plaintiff is prepared now.

Mr. Mahoney: I think we will need a little preparation on some of them. It depends on which ones he offers.

The Court: Very well. Do you wish to proceed, Mr. Duque?

Mr. Duque: Yes, your Honor.

I offer first the affidavit of Frank K. Miles.

The Court: Frank K. Miles?

Mr. Duque: Yes, your Honor.

The Court: When was it filed?

Mr. Duque: His affidavit was filed on——

The Court: September 14th?

Mr. Duque: September 14, 1955.

The Court: The affidavit of Frank K. Miles will be received——

Mr. Mahoney: Your Honor, that offer is objected to on the ground that the matters contained therein are immaterial and irrelevant and relate to financial dealings between Glide Windows, Inc., and the defendant corporation, and financial dealings with Panaview Door & Window Co. and defendant corporation, which are not relevant here in any way whatsoever. [220] It has already been stipulated that the contract which was constituted by the purchase order involving the dies was fully performed, and collateral debts or collateral financial negotiations between either Glide Window or Panaview Door & Window Co. and the defendant here are not in any way relevant or material.

The Court: The affidavit is received in evidence. The objection is overruled. The affidavit is received as Exhibit A, as, pro tanto, the direct examination of the witness Frank K. Miles.

(The affidavit referred to, marked Defendant's Exhibit A, was received in evidence.)

DEFENDANT'S EXHIBIT A

[Defendant's Exhibit A is set out in full, pages 12 to 16 of this printed record.]

The Court: Do you wish to ask anything further of Mr. Miles?

Mr. Duque: Yes, your Honor, there is one matter that I wish to ask Mr. Miles.

The Court: Before you do that, don't you think it might be helpful for you to offer each affidavit that you intend to offer, so that the plaintiff will know and will be advised?

Mr. Duque: Very well.

Your Honor, I also offer the affidavit of Mr. James M. Hairston, which was filed in this court on September 15th. But since—and this statement will apply to all of the affidavits—there has been no issue raised or no evidence produced on the part of the plaintiff as to the custom and usage in [221] the trade; in other words, they have offered no evidence in support of the allegations of their complaint that custom and usage in the trade was broken or was violated by the defendant, we do not wish to raise the issue at this time, your Honor, because there is no evidence to support the allegation of the complaint.

So in all of the affidavits that I offer, or in any of them, any testimony with regard to the custom and usage in the trade, I would not offer and would not care to have a part of the record at this time.

The Court: Very well. Then, with that understanding, the affidavit of James M. Hairston is received as Defendant's Exhibit B, as, pro tanto, the direct examination, the direct testimony of James M. Hairston.

(The affidavit referred to, marked Defendant's Exhibit B, was received in evidence.)

DEFENDANT'S EXHIBIT B

[Defendant's Exhibit B is set out in full, pages 29 to 34 of this printed record.]

Mr. Duque: I next offer the affidavit of Harry M. Sargeant which was filed in this court on September 17, 1955, excluding that portion thereof, if any, which relates to custom and usage in the industry.

The Court: It will be received as Defendant's Exhibit C, pursuant to the stipulation.

(The affidavit referred to, marked Defendant's Exhibit C, was received in evidence.)

DEFENDANT'S EXHIBIT C

[Defendant's Exhibit C is set out in full, pages 17 to 21 of this printed record.]

Mr. Duque: I next offer the affidavit of O. J. Meyer, Jr., [222] which was filed in this court on September 15, 1955, excluding any statement as to custom and usage in the industry.

The Court: It will be received, pursuant to the stipulation, as Defendant's Exhibit D.

(The affidavit referred to, marked Defendant's Exhibit D, was received in evidence.)

DEFENDANT'S EXHIBIT D

[Defendant's Exhibit D is set out in full, pages 34 to 38 of this printed record.]

Mr. Duque: And I offer in evidence the affidavit of William Yates——

The Court: William O. Yates?

Mr. Duque: William O. Yates, your Honor.

The Court: Filed September 15, 1955?

Mr. Duque: Yes, your Honor.

The Court: It may be received, pursuant to the stipulation, as Defendant's Exhibit E.

(The affidavit referred to, marked Defendant's Exhibit E, was received in evidence.)

DEFENDANT'S EXHIBIT E

[Defendant's Exhibit E is set out in full, pages 22 to 28 of this printed record.]

The Court: Does that conclude the list?

Mr. Duque: That concludes the list at this time as a part of the defendant's defense.

There is another affidavit, of Mr. Robert Milton Beck who is out here from the East, and if the issue of custom and usage is to be raised in rebuttal—I don't see how it could at this stage of the proceedings—but Mr. Beck's affidavit relates to the custom and use in the trade. I would like

permission to put him on or put his affidavit into evidence [223] and have the plaintiff cross-examine him, if they wish to, at this time so that he may go back home.

The Court: Well, as I understand, the plaintiff is not raising any issue as to custom and usage.

Mr. Mahoney: Your Honor, there was a pleading as to the custom in the trade of disclosures made to extruders. And there was also in these affidavits a contention that there was a custom that the dies could be used freely. So there were two different customs pleaded and alleged, referred to here.

The Court: But the plaintiff is not raising that issue?

Mr. Mahoney: We are not raising that issue here.

Mr. Duque: In other words, there will be no issue raised as to custom and usage in the industry, either as to the use of dies or as to the use of confidential or trade information?

Mr. Mahoney: That is correct.

Mr. Duque: Then under those circumstances I will not offer the affidavit of Mr. Beck.

The Court: Very well.

Mr. Duque: May I proceed to call Mr. Miles, your Honor?

The Court: Yes, you may.

Mr. Duque: Mr. Miles, will you step forward, please, sir. [224]

FRANK K. MILES

called as a witness on behalf of the defendant, being first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Frank K. Miles.

Direct Examination

By Mr. Duque:

Q. Mr. Miles, what is your capacity with Reynolds Metals Company?

A. Regional credit manager.

Q. Now, Mr. Miles——

The Court: Do you wish the affidavit before the witness, Exhibit A?

Mr. Duque: Yes, your Honor.

The Court: Mr. Clerk, will you place Exhibit A before the witness?

(The document was placed before the witness.)

Mr. Duque: Mr. Clerk, may I please have Exhibits 22 and 23?

(The documents were handed to counsel.)

Q. (By Mr. Duque): Mr. Miles, I show you Exhibit 22, Plaintiff's Exhibit 22, and Plaintiff's Exhibit 23, and ask you if you have ever seen the originals of those letters?

A. I saw 22. That was addressed to me.

(Testimony of Frank K. Miles.)

I saw a copy of 23. [225]

Q. Did you reply to Exhibit 22?

A. Yes, sir.

Q. Now, I show you a copy of a letter dated April 6, 1955, addressed to Mr. L. Pinson, general manager, and apparently written by F. K. Miles, and ask you whether you have ever seen the original of that letter? A. Yes, sir.

Q. Will you tell us what was done with the original of that letter, please, sir?

A. It was sent to Mr. Pinson.

Mr. Duque: At this time, if the court please, we offer a copy of this letter, which has been shown to the plaintiff's counsel, in evidence as the defendant's next exhibit in order.

The Court: Is there an objection?

Mr. Mahoney: No objection.

The Court: That would be Defendant's Exhibit F, Mr. Clerk?

The Clerk: F, your Honor.

The Court: It may be received in evidence.

Mr. Duque: Thank you.

(The document referred to, marked Defendant's Exhibit F, was received in evidence.)

(Testimony of Frank K. Miles.)

DEFENDANT'S EXHIBIT F

(Copy)

Reynolds Metals Company
General Offices: Richmond, Virginia

April 6, 1955.

Mr. L. Pinson, General Manager,
Panaview Door and Window Company,
13434 Raymer Street,
North Hollywood, California.

Dear Mr. Pinson:

Please pardon the delay in answering your letter of March 30th which advised us that because we had not shipped material in balanced loads, we had worked a great hardship on you, and that you would be unable to recognize our invoices until after completion of the order.

After checking this very thoroughly, I find that on March 4th, your Mr. Norm Bowker, who I understand is your assistant, requested that we ship any items which were ready, as soon as possible. When we originally entered this order, we stated it was for component parts and must be shipped at one time or in equal portions. This would have been done except for the fact that we were authorized to ship as we did.

We must, therefore, request that our invoices be honored in accordance with the terms as shown. I

(Testimony of Frank K. Miles.)

am, however, requesting that in the future Mr. Kavich, salesman handling your account, not to authorize shipments of a portion without first receiving your written approval.

Yours very truly,

F. K. MILES,
Regional Credit Manager.

cc: A. R. Kavich, Los Angeles;
A. W. Herthel, Richmond;
T. J. Walsh, Los Angeles;
File.

FKM:jp.

Received in evidence November 22, 1955.

Q. (By Mr. Duque): Mr. Miles, you have read your affidavit which has been received in evidence in this case, have you not? [226]

A. Yes, sir.

Q. Have there been any credit or financial developments which have occurred since the date you made this affidavit, as relates to either Glide Window or Panaview Company?

A. The amount owing is changed. They have paid all, but I think it is, $2,000 on Glide. I think Panaview has been paid in full. That was paid early this month, I believe.

Q. And there is still a balance due on the Glide account of $2,000? A. Yes.

(Testimony of Frank K. Miles.)

Mr. Duque: With the introduction of that affidavit and that supplementary testimony, I have no further questions of the witness, your Honor.

The Court: Very well.

Mr. Mahoney: May I have the letter, Plaintiff's Exhibit F?

(The document was handed to counsel.)

Cross-Examination

By Mr. Mahoney:

Q. Mr. Miles, during the period involved, at the time when you replied to Mr. L. Pinson in your letter of April 6, 1955, regarding the failure to ship materials in balanced loads, was Reynolds Metals Company supplying extrusions to [227] Windsor Supply Company?

A. I am sorry. I don't understand. I don't understand the question.

Q. During the period involved at the time in which this series of correspondence was engaged in, Mr. Pinson wrote you a letter——

A. March and April. Yes.

Q. March and April? A. Yes.

Q. And you are familiar with the tenor of that correspondence?

A. As it pertains to credit, yes.

Q. Now, he wrote you regarding shipments, though, didn't he? A. Yes, sir.

Q. And you replied in regard to shipments, didn't you? A. Yes, sir.

(Testimony of Frank K. Miles.)

Q. You didn't say anything about credit?

A. Yes.

Q. Is that correct?

A. I did mention about it because the question of payment was involved. That was the only reason that I entered into the shipment part.

Q. Can you find in this letter a statement in which you justified your failure to ship because of failure of the [228] plaintiff to pay at any time an invoice presented to plaintiff by defendant?

A. There is nothing in this letter that—about nonpayment of—or nonshipment. This was pertaining to the fact that Mr. Pinson and Mr. Reznick had complained that we did not ship in balanced shipments as they had requested. This letter simply stated that we had shipped, at their request, material that was ready.

Q. Now, why weren't you able to ship balanced shipments? A. Originally?

Q. At the time these letters were written.

A. It wasn't at this time that the shipment was —that we were talking about. It was before that. And the main reason this was delayed was because of credit reasons.

Q. Had you not O.K.'d the purchase order on the credit on this order in March or February, 1955? A. Yes.

Q. And wasn't there an understanding between your company and Mr. Reznick of Panaview Door & Window Co. that you would not present the statement for purchase order until you had completed

(Testimony of Frank K. Miles.)

the order, because unbalanced and incomplete shipments prevented them from fabricating the doors and therefore they could not ship them and therefore they could not pay? [229]

A. Well, I assume you mean that we agreed not to expect payment. He said "invoice," I believe.

The Court: This matter of paying the bill, as I see it, doesn't have a thing to do with the case. As far as I am concerned, it doesn't matter if this plaintiff owes them any number of thousands of dollars and any number of months overdue.

Mr. Mahoney: That is exactly the way we feel about it, your Honor, and we don't think that the testimony in the affidavit regarding moneys is in any way relevant. And we previously stated that.

The Court: You are correct. The only reason I admitted it was because of the stipulation to receive the affidavit as part of the direct testimony.

Mr. Mahoney: Because, I think, the purpose here, your Honor——

The Court: The financial dealings, that's ancient history. If the defendant overextended credit, that's another story. It has nothing to do with this case, as I see it.

Q. (By Mr. Mahoney): Mr. Miles, did you handle the credit for Windsor Supply Company during this period of time? A. Yes, sir.

Q. And you had extended credit to Windsor Supply? A. Yes.

Q. And your company was supplying Windsor Supply Company [230] with extrusions under pur-

(Testimony of Frank K. Miles.)

chase order, whose credit was approved by you at the time? A. Yes.

Q. And the Windsor Supply Company was getting extrusions from Reynolds Metals Company at the same time it was being shorted, Panaview was being shorted and complaining about these shorts to you?

A. I don't know. I would have to look at the records to find out.

Q. Well, you knew Panaview was being shorted? A. No, sir.

Mr. Duque: To which question I object on the grounds it is incompetent, irrelevant, and immaterial and states facts not in evidence.

Mr. Mahoney: Your Honor, there is a series of letters here which reveals that Panaview was being shorted.

The Court: Panaview claims it was being shorted, I suppose.

Mr. Mahoney: And Mr. Miles replies and admits it.

Mr. Duque: I suggest we permit the court to read the letters, Mr. Mahoney. And I think that is a matter for the court's interpretation and not yours or mine at this stage of the proceedings.

The Court: Well, the letters will speak for themselves, I take it. It's a matter of [231] argument.

Mr. Mahoney: Well, your Honor, I did ask the plaintiff whether, at the time Mr. Pinson——

(Testimony of Frank K. Miles.)

The Court: Doesn't his affidavit show when he was extending credit?

Mr. Mahoney: He doesn't go into when he was extending credit.

The Court: Well, why don't you ask him?

Q. (By Mr. Mahoney): When did you first extend credit to Windsor Supply Company?

A. I believe it was December, 1954.

The Court: And you have been extending credit to them ever since?

The Witness: Yes, sir.

The Court: Doesn't that cover it?

Mr. Mahoney: There is one other point in the affdavit——

The Court: That is, if the December, 1954, date is satisfactory?

Mr. Mahoney: That is not correct, your Honor, because——

The Court: Ask him if it isn't a fact that it was an earlier date.

Q. (By Mr. Mahoney): Wasn't there an earlier date when a verbal order was given by Windsor Supply Company to Reynolds Metals Company?

A. I don't know. I only go on the orders that are given to the credit department for approval. I can tell you [232] when we approved the first order that was referred to us.

Q. But it would have been possible that the order could have been in the plant and in the works prior to credit approval by you?

(Testimony of Frank K. Miles.)

A. I only know that the plant is not supposed to do anything without credit-department approval.

Mr. Mahoney: That will be all.

The Court: Any redirect examination?

Mr. Mahoney: Excuse me, your Honor.

(Whereupon there was a conference between counsel.)

Mr. Mahoney: Your Honor, we are attempting here to obtain a stipulation from the defendant, from the records, that the first shipment of extrusions by Reynolds Metals was on December 20, 1954.

The Court: December 20th?

Mr. Mahoney: Yes, your Honor.

The Court: Well, it was covered in the Oldenkamp testimony this morning that the purchases from Reynolds by Windsor extended from September, 1954, to date. Doesn't that cover it?

Mr. Mahoney: Yes, your Honor, that testimony would cover it. We were introducing this as corroborative evidence of Mr. Oldenkamp's statement.

The Court: Is there any dispute about it?

Mr. Duque: No, your Honor, not so far as I know of.

The Court: Anything further? [233]

Mr. Duque: I understand that the date is September?

Mr. Ford: December.

The Court: That is the way it is in my notes. The purchases by Windsor from Reynolds, $155,-

(Testimony of Frank K. Miles.)

624.97, covered the period from September, 1954, to date.

Mr. Mahoney: Well, your Honor, the negotiations began in September.

Mr. Duque: I don't think the shipments started until December.

The Court: December?

Mr. Mahoney: December 17th.

The Court: Do you both agree?

Mr. Duque: Yes.

Mr. Mahoney: December 17, 1954. That is why we asked for the stipulation, because I don't believe Mr. Oldenkamp testified specifically as to when the shipment started.

That is all, Mr. Miles.

Mr. Duque: No further questions.

The Court: You may be excused.

(Witness excused.)

The Court: Your next witness?

Mr. Duque: I may say in connection with Mr. Miles' affidavit, the reason I offered it is because there is an allegation in the complaint that we financed and thereby unfairly competed with the other competitors, and that is the [234] reason for offering the affidavit, and that is why I consider it relevant.

The Court: Very well. Your next witness?

Mr. Duque: Mr. Yates.

The Court: Mr. Yates' affidavit is Exhibit E.

WILLIAM O. YATES

called as a witness on behalf of the defendant, being first duly sworn, was examined and testified as follows

The Clerk: State your full name, please.

The Witness: William O. Yates.

The Court: Will you please place Exhibit E before the witness?

The Clerk: Yes, your Honor.

(The document was placed before the witness.)

Direct Examination

By Mr. Duque:

Q. Mr. Yates, you have previously read the affidavit which was filed in this action on September 15th and which the clerk has now placed before you? A. Yes, I have.

Q. You know its contents to be true and correct as of this date? A. That is correct.

Q. And you are willing to reaffirm the statements made [235] therein under oath at this time?

A. Yes, I am.

Mr. Duque: No further questions at this time.

Cross-Examination

By Mr. Mahoney:

Q. Mr. Yates, in your affidavit on page 2 thereof, line 13, you indicate that you first came in contact with Panaview Door & Window Co., in the early part of 1954 and at that time you called on Mr. J.

(Testimony of William O. Yates.)

L. Reznick who was a former officer of Glide Windows, Inc.

You know, of course, from the testimony here which I believe you have heard, that Mr. Reznick is still an officer of Glide Windows, Inc., is that correct? A. That is correct.

Q. What was the purpose of your visit to Mr. Reznick?

A. Exactly as stated here in the affidavit. I called to find out, from the sales policy, whether there were any reasons why the unpaid balance of some $16,000 had not been paid.

Q. Had anyone instructed you to do this?

A. No one had instructed me, no.

Q. No one in the Reynolds Metals Company had told you to go over and see Reznick regarding the payment of the $16,000? [236]

A. No one had instructed me, no.

Q. How does it happen that in your capacity as regional sales manager you were handling a credit matter?

A. I wasn't handling a credit matter. This was affecting the sales, and I wanted to find out what the problem was, why Mr. Reznick had not paid up.

Q. When you say "affecting the sales," you mean that this debit was preventing you from getting further sales from Panaview and affecting your relationship? A. Yes, that's right.

Q. And you wanted to remove this debit as an obstacle?

A. I wanted to find out what the problems were.

(Testimony of William O. Yates.)

Mr. Duque: Will you speak just a little louder, please, Mr. Yates?

The Witness: All right.

Q. (By Mr. Mahoney): Now, when you visited Mr. Reznick did he at that time discuss with you a new product that Panaview was considering putting on the market? A. No, he did not.

Q. And he didn't discuss the fact that there would be a large number of extrusions needed, and in large quantity, for this new product?

A. No. He talked about how much they were growing and how many more extrusions they would need. But he didn't talk about any specific [237] item.

Q. He didn't mention the new product at all?

A. No.

Q. Now, Mr. Yates, in your affidavit you speak of Mr. Reznick informing you that Panaview was desirous of having some extruded shapes manufactured in connection with a sliding door which it was producing, and wondered whether Reynolds Metals Company would be interested in manufacturing the extruded shapes.

You have previously stated that you didn't discuss the particular product.

Mr. Duque: I object to that as not the testimony of the witness.

Mr. Mahoney: Will you read the last series of questions, please?

(Record read.)

(Testimony of William O. Yates.)

Q. (By Mr. Mahoney): You say, then, that Mr. Reznick did not discuss with you a specific item?

A. No, he didn't discuss a specific item.

Q. And in your affidavit you say, "Mr. Reznick informed me that Panaview was desirous of having some extruded shapes manufactured in connection with a sliding door which it was producing, and wondered whether Reynolds Metals Company would be interested in manufacturing the extruding shapes reequired."

Don't you consider a sliding door a specific item?

A. Well, "a sliding door." Window and door business— [238] he talked generally about requiring extrusions for a sliding door.

Q. For a sliding door? Is that correct?

A. That is correct.

Q. Now, how did you terminate your conversation with Mr. Reznick? Did you come to a conclusion, as stated, that the debt would be liquidated by the issuance of the note by Glide to Reynolds? Is that correct?

A. No, that is not correct, not on the first call. We left the matter on the first call with Mr. Reznick that unless he paid up, I was sure the matter would be referred to our legal department for collection.

Q. Didn't you tell him that, assuming the credit of Panaview was approved by Reynolds Metals Company, and Glide Windows would execute promissory notes for the unpaid balance, and at that

(Testimony of William O. Yates.)

time didn't Mr. Reznick agree to have the promissory notes executed?

A. Mr. Reznick did agree to have the promissory notes executed on a call that I made with Mr. Miles.

Q. And was this the same call that we are speaking of now? A. Yes.

Q. In other words, when you left, the whole situation had been clarified considerably and Mr. Reznick had agreed to execute the notes, is that [239] right?

A. Well, yes and no—not entirely. He wanted to think about it, and he would let us know.

Q. But your affidavit says that Mr. Reznick agreed to have the promissory notes executed.

A. Well, subsequently he did agree.

Q. Not at that meeting? A. That's right.

Q. Now, you mention an assembly picture of the sliding door which was received by you from Panaview. Are you an engineer, Mr. Yates?

A. No, I am not an engineer.

Q. Now, do you know the distinction between an assembly picture and a cross-sectional diagram?

A. Do I know the distinction between an assembly picture and cross-section? Yes, I do.

Q. Now, I show you Plaintiff's Exhibit 6 and ask you if you recall whether this was the drawing which you saw at the time the "assembly picture" was processed by your extrusion engineering department. A. I don't remember.

Q. Can you remember what the "assembly pic-

(Testimony of William O. Yates.)

ture'' you saw showed?

A. I just recall that it was an assembly, not showing too much detail.

Q. Were there cross-sections of the [240] individual extrusions? A. I don't remember.

Q. Was there a cross-section of the assembly of the door as shown in Plaintiff's Exhibit No. 6?

A. I don't remember.

Q. In other words, you don't remember anything about the drawing, do you?

A. I just remember that an assembly drawing came in, which I took a quick look at, and that is all.

Q. But when you say ''assembly drawing,'' you don't even remember whether it was an assembly drawing, do you?

A. Yes, I remember. It was an assembly drawing.

Q. Well, what kind of an assembly drawing was it, of what?

A. It was an assembly drawing of a sliding door.

Q. Was it in cross-sectional form?

A. I have no idea.

Q. Mr. Yates, in your affidavit you say it was a full cross-section picture of the proposed sliding door, and now you say you don't remember.

Do you realize, Mr. Yates, that your testimony here is under oath? A. Yes.

Q. Now, which is true: That the assembly picture which you saw was a full cross-sectional pic-

(Testimony of William O. Yates.)

ture of a proposed [241] sliding door, or don't you remember what it was?

A. If this is described as a full cross-sectional, this is exactly what I saw (indicating).

Q. That is, that drawing is exactly what you saw?

The Court: "That drawing" is exhibit——

Mr. Mahoney: Plaintiff's Exhibit No. 6.

Q. Is that right? A. Yes.

Q. Now, Mr. Yates, you refer to "my extrusion engineering department." Is the extrusion engineering department under your supervision?

A. Yes.

Q. Are you fully acquainted with the procedures which take place therein? A. Not fully.

Q. Do you know what happens when a drawing such as Plaintiff's Exhibit No. 6 is submitted to the extrusion department?

A. Yes, I know that it is processed and carefully checked for tolerances, and our die prints are prepared.

Q. And what are these die prints based upon?

A. What are these based upon?

Q. Yes. Aren't they based upon the drawings which are submitted to you by the customer?

A. Well, yes, they are. [242]

Q. And do you recall whether there were any changes made in the construction or design of the extrusions or of the assembly which is shown in Plaintiff's Exhibit No. 6, by Reynolds Metals Company in its extrusion engineering department?

(Testimony of William O. Yates.)

A. Yes. Mr. Meyer advised me that he made several changes.

Q. Now, are you familiar with those changes?

A. No, sir.

Q. In other words, your statement regarding required modifications is hearsay. In other words, you don't know of your own knowledge whether modifications were required in the drawings submitted by the plaintiff to the defendant and which ultimately resulted in the preparation of the die prints by the Reynolds Metals extrusion department?

A. I know that Mr. Meyer worked on this quite a bit.

Q. He told you this?

A. No. Well—I mean, I am there every day. I knew that he was working on it.

Q. But you wouldn't know whether he was making changes or just copying the drawings, would you? Do you supervise him that closely?

A. Yes, I do.

Q. Can you say, then, of your own knowledge, that modifications were made? [243]

A. Yes, I can.

Q. Were these serious modifications?

A. I would say that they were.

Q. In the shape of the extrusions?

A. Yes.

Q. I show you Plaintiff's Exhibit No. 6, which is the drawing that was submitted by the plaintiff to

(Testimony of William O. Yates.)

the defendant, and I show you the die prints, Plaintiff's Exhibit No. 8, which were submitted by Reynolds Metals Company to the plaintiff for its consideration and review; and I ask you to show me where the modifications which were made by Reynolds Metals Company in the die prints as compared with the original drawing were made.

A. Well, I am not prepared to answer it until I study this for a while.

Q. Well, at the time you made this affidavit you were prepared or you wouldn't have made the statement.

A. Well, I know there were considerable dimensional changes made.

Q. Now, isn't it possible, Mr. Yates, that these dimensional changes might be more apparent than real, that a different point on the extrusion might be taken to create an illusion of a dimensional change? Let us say, for example—and I am now——

The Court: Won't Mr. Meyer be called? [244]

Mr. Duque: Yes, your Honor.

The Court: Let's save some time.

Mr. Mahoney: All right, your Honor.

That will be all, Mr. Yates.

Your witness, Mr. Duque.

Mr. Duque: No further questions.

The Court: You may step down, Mr. Yates.

(Witness excused.)

The Court: Your next witness?

Mr. Duque: Mr. Meyer, take the stand, please.

The Court: Mr. Meyer's affidavit is Exhibit D.

OSCAR J. MEYER, JR.

called as a witness on behalf of the defendant, being first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness Oscar J. Meyer, Jr.

Direct Examination

By Mr. Duque:

Q. Mr. Meyer, have you read your affidavit, the original of which is filed in this Court, and which the clerk has placed before you?

A. Yes, I have.

Q. Do you know of your own knowledge, as of the present date, that the facts stated therein are correct and [245] true and that you would be willing to swear to them under oath at this time?

A. They are.

Mr. Duque: No further questions at this time, your Honor.

Cross-Examination

By Mr. Mahoney:

Q. Mr. Meyer, in your affidavit you mention that you left Purdue University in 1948. Are you a graduate of Purdue University?

A. No, I am not.

Q. Are you a registered engineer in the State

(Testimony of Oscar J. Meyer, Jr.)

of California? A. No, I am not.

Q. What are your qualifications for the position which you hold at the Reynolds Metals Company?

A. Well, I have had four years of engineering training at Purdue University. The fact that I don't hold an engineering degree is that the last year I attended Purdue I was working towards two degrees, and though I have the total number of hours required for an engineering degree there are certain senior-year credits which I still lack. But during that time I have had training in mechanical drafting, various mechanical engineering courses which deal in problems of assembly fits, [246] machine fits, machine design, actual design of objects like mechanical jacks and various other items.

Q. Now, Mr. Meyer, I notice on page 1, lines 24 through 29 of the affidavit, you set forth the duties which you perform, and among them the operation of the Los Angeles extrusion engineering department. Do you perform that function under Mr. Yates' supervision? A. I do.

Q. And did Mr. Yates submit to you a drawing which was a Panaview Door & Window Company drawing, for your review and for the making of die prints?

A. A print which was submitted to me which was evidently run off of this tracing which was——

Q. Will you look—excuse me for interrupting.

A. ——used for the purpose of making section drawings.

Q. Will you look at Plaintiff's Exhibit No. 6,

(Testimony of Oscar J. Meyer, Jr.)

whether the tracing was a copy of Plaintiff's Exhibit No. 6?

A. Yes. I checked this tracing against the print which we have in our file.

Q. This, then, is actually identical, so far as you have been able to determine, with the tracing which was received by you in your department?

A. That's right.

Q. Now, Mr. Meyer, do you notice that upon that drawing, Plaintiff's Exhibit No. 6, there is a plurality of cross-sectional [247] extrusions, extrusion shapes? A. Yes, there are.

Q. And that these extrusion shapes are marked 1-X to 9-X serially? A. That's correct.

Q. Now, before you received a print of this drawing, Plaintiff's Exhibit No. 6, from Mr. Yates, had you ever assisted anyone, including Mr. Grossman, at the Panaview Door & Window Co., in the design of these extrusions?

A. Prior to that time, no.

Q. In other words, Mr. Grossman at no time called you in and asked you for your advice or consulted with you as to the dimensions or the size or the shapes of the extrusions? A. No.

Q. Have you ever been engaged in the manufacture of aluminum-frame sliding doors?

A. No, sir.

Q. Have you ever sold aluminum-frame sliding doors? A. No, I have not.

Q. Therefore, all the information which was imparted to you regarding this product came in the

(Testimony of Oscar J. Meyer, Jr.)

form of a print of drawings, of the drawing on Plaintiff's Exhibit No. 6?

A. Pertaining to this particular product, yes.

Q. Now, will you explain, by reference to Plaintiff's Exhibit No. 8, which is a sheet of die prints, whether you [248] made the originals of the drawings shown in the prints yourself personally?

A. No, I did not make the drawings.

Q. Were these drawings made under your supervision? A. They were.

Q. Now, do you know whether any significant modifications were made in any of the extrusions as shown in the drawing, Plaintiff's Exhibit No. 6, as compared with the die prints shown in Plaintiff's Exhibit 8?

Would you compare them with the extrusions as shown in Plaintiff's Exhibit No. 6?

A. One change which is apparent on Section 4-X was the addition of special commercial tolerances to facilitate assembly of that section with the stiles.

Q. Now, will you explain what you mean by "commercial tolerances"?

A. Commercial tolerances in the extrusion industry will vary plus or minus a certain amount, depending upon the type of dimension, whether it is a metal dimension or a space dimension. On these drawings, as submitted to our department, the same nominal dimension in the case of the stiles and in the case of the top and bottom rails. Now, had we dimensioned both the top and bottom rails and the stiles section using that same nominal dimension,

(Testimony of Oscar J. Meyer, Jr.)

conceivably those parts would never have assembled together in the manner in which it [249] was intended.

Q. You say conceivably. You don't know actually whether they would have assembled together, do you?

A. They could have assembled together, possibly. But there would be no guarantee that they would.

Q. But you have no guarantee that they would have not? A. No.

Q. Now, will you show me and the Court wherein this change was made? We are now referring, for the record, to Plaintiff's Exhibit 6 for identification, and that is——

The Court: 6 is in evidence, is it not?

Mr. Mahoney: I am sorry, your Honor. 6 in evidence. I said "for identification" automatically.

And we are also referring to Plaintiff's Exhibit 8 and print No. 4-X. It's drawing No. L-8438.

Q. (By Mr. Mahoney): Now, what is this change that you refer to?

A. The addition of these special tolerances to the .812 dimension, which does not appear on this tracing.

Q. In other words, all you added there was the tolerance figure .812, is that correct?

A. No. The dimension is shown .812. We added a tolerance, plus nothing, minus .020.

Q. Oh, in other words, the tolerance was actually

(Testimony of Oscar J. Meyer, Jr.)

shown, the dimension was actually shown but all you did was [250] add the tolerance?

A. The dimension, as shown on the customer's tracing, carries in our interpretation a tolerance of plus or minus ten-thousandths. This is the addition of a special commercial tolerance.

Q. So you added ten-thousandths more, is that correct?

A. We put the tolerance all on one side.

Q. I see.

A. We further changed the design on the serrations, which the customer did not detail, designing them so that they would not be wiped out in the process of extrusions.

Q. Isn't that inherent in standard extrusion design, that you would take a detail like that and design it for use with the manner in which you made the dies?

A. It is not the manner in which we make the dies. It is to guarantee the customer the end product that he desires.

Now, to design the section drawings from which our people make their die drawings and resulting dies, it is necessary to put certain radii on to guarantee that the dies servicing those areas will not be wiped out in the process of extruding and as a result would not have serrations to hold the weatherstripping in place.

Q. Comparing the two cross-sections and the overall dimensions thereof, was there any significant change in [251] shape between the two cross-sec-

(Testimony of Oscar J. Meyer, Jr.)

tions? A. In the shape itself? No.

Q. Are there any other contributions which were made by you, as an employee of the Reynolds Metals Company, to the design of the extrusion?

A. Well, the same problem holds true in the top rail, Section 5-X.

Q. Was this once again the addition of tolerances?

A. That's right. Now, at the time that these prints were submitted to the customer the question of the actual assembly between the jamb sections, the header and the sill sections were raised. These are not the latest prints. We made these drawings on the basis of the dimensioning shown by customer, which would mean that these sections would not assemble again, the jamb sections into the header and into the sill sections the way the customer intended.

Q. Do you mean that the extrusions as shown in those prints could not be assembled into a sliding door sash and frame?

A. There is no guarantee that they would assemble.

Q. Well, do you have any guarantee that they wouldn't? A. No.

Q. Did you make any significant changes in any of the shapes of any of the extrusions shown in the drawings in Plaintiff's Exhibit 6 and Plaintiff's Exhibit 8—in [252] Plaintiff's Exhibit 8?

A. There was another problem raised with the top rail as to the insertion of weatherstripping. I

(Testimony of Oscar J. Meyer, Jr.)

was asked by the salesman to make a personal call upon the customer to discuss this particular problem, which I did.

At that time they submitted a revised print revising the top rail section, which is shown as 5-X, changing the weatherstripping detail. That detail in itself was not sufficient to guarantee the assembling of the weatherstrip within it, because at a later date I received a print from the customer showing the detail of the Schlagel weatherstripping section and the nominal dimensions of that weatherstripping were the same in the thickness and width as the dimensions on the extrusion. Again, not allowing for tolerances on the extrusion and the tolerances on the weatherstripping there is no guarantee that they would have assembled.

Q. But there is no guarantee they wouldn't have?

A. With the same nominal dimension in width of .437, the inherent straightness of the individual shapes, it would be impossible, except under terrific force, to assemble them.

Q. In any instance did you suggest the overall shape of an extrusion to Mr. Grossman or any employee of the Panaview Door & Window Co.?

A. The overall shape? No.

Q. What did you really supply in the way of information [253] to Mr. Grossman, or to any other employee of the Panaview Door & Window Co., in the way of technical knowledge?

(Testimony of Oscar J. Meyer, Jr.)

A. The use of tolerances to effect the assembly of their various parts with one another.

Q. But you didn't at any time do more than disclose tolerances?

A. Other than the minor changes that I have shown you on the sections to facilitate the holding of the weatherstripping within the sections.

Q. That is all you did?

A. That and the weatherstripping in the top rail.

Q. That is all the modification that was accomplished by your department in handling this drawing?

A. That is the total on the modifications.

Q. Now, Mr. Meyer, is it not true that it is the practice of the extrusion trade to have the extrusion engineering department guarantee the detail of tolerances in relationship to assembly?

A. Would you repeat that question?

Q. Is it the practice in the trade, in other words, in the department such as the one with which you are connected, wherein you take drawings from a customer, is it not the practice to check out the tolerances, and isn't that part of your job and part of the duty you perform for the customer?

A. Knowing the end use of the extrusions we do attempt [254] to work out a product which will suit the customer's purpose in the best way. Which would mean to work out assembly tolerances or assembly dimensions for him and with him.

Q. But so far as Plaintiff's Exhibit 6 is con-

(Testimony of Oscar J. Meyer, Jr.)

cerned, and so far as your knowledge of Defendant's Exhibit A is concerned, are the bulk of the tolerances and the bulk of the dimensions which were presented by the plaintiff to your department substantially unchanged?

A. The bulk of the dimensions, yes.

Q. Now, you have previously testified in your affidavit that there was nothing in the Panaview Door & Window Co. design which was unique or unusual. What is your qualification for that statement, Mr. Meyer?

A. When I started work with Reynolds Metals Company I was originally employed as a drafting engineer in Louisville, whose job it was to take sections, or to take prints submitted by customers, make the necessary section drawings from these and to work up pricing information. In that position I became well acquainted with I would say well over four or five thousand various sections.

I then was transferred from that department into the architectural division, where again I was—my duties brought me in contact with various architectural applications, store fronts, windows, sliding windows, doors. The work there was composed of design of certain extrusions, working [255] with standard architectural shapes which are in distributors. And from that job I was sent to Phoenix for six months' training course in our Phoenix extrusion mill. There I worked from the beginning end of the metal coming into the plant until the time it is shipped out of the plant, working in the

(Testimony of Oscar J. Meyer, Jr.)

various phases and again coming into contact with several hundred other additional shapes.

From that time I have been transferred to the Los Angeles where I have operated in the position as regional extrusion engineer, again coming into contact with various extrusions.

Q. When you say there was nothing unique or unusual, you mean you have seen identical extrusions to these many times?

A. I have seen extrusions which incorporated the same features that these extrusions incorporated.

Q. Have you seen extrusions which were the same? A. Identical.

Q. You say that they are not unique. So if they are not unique or unusual you must have seen substantially similar or identical extrusions.

The Court: Do you mean in shape or dimension?

Mr. Mahoney: In shape.

The Witness: Basically, part for part, a header section used in this door is quite similar to header sections in other doors. [256]

Q. (By Mr. Mahoney): Have you any documentary evidence which would go to prove your statement in that regard?

A. I have none presently.

Jamb sections are similar in nature.

Q. Are you talking about the function or the design of the extrusion?

A. You asked me about the shape of the extru-

(Testimony of Oscar J. Meyer, Jr.)

sion and their similarity to other shapes which I have come into contact with.

In my experience in hundreds of extrusions or drawings that I have seen and processed, I have seen other sections, header for header, jamb for jamb, and so forth, that are similar in design.

Q. But not identical in shape with these?

A. Identical? No.

Q. And do you know of your own knowledge, and did you know when you wrote and read and signed this affidavit, that the dimensions of such prior art extrusions which you have referred to were the same as the dimensions shown on Plaintiff's Exhibit No. 6?

A. Did I have prior knowledge that the dimensions of other shapes were——

Q. Did you have a knowledge——

Mr. Mahoney: Read the question, please.

(Question read.) [257]

Mr. Duque: Excuse me. I didn't quite get that. Was that "prior art extrusions"?

Mr. Mahoney: That's right.

Mr. Duque: Prior art, a-r-t?

Mr. Mahoney: That's right. Excuse me, Mr. Duque. This is common parlance for patent attorneys. What it means is that any of these extrusions which are prior in time to the witness' statement. In other words, he was referring to things he had seen in the past and it was prior in time, and we refer to the particular field as "art."

(Testimony of Oscar J. Meyer, Jr.)

Mr. Duque: I apologize for my ignorance. I just didn't know the phrase, your Honor.

Mr. Mahoney: Will you answer the question?

The Witness: I wonder if you would rephrase it. I still don't know or follow what you are asking. You are asking if I——

Mr. Mahoney: Well, I will give you the question again.

Q. (By Mr. Mahoney): When you speak of these previous extrusions, and then you compare them to the extrusions shown in the drawings, have you any basis or recollection that the dimensions which were part of the previous extrusions were the same as the dimensions shown in those drawings?

A. No. I did not say that the dimensions were identical.

Q. Have you ever designed aluminum frame sliding [258] doors? A. No, I have not.

Q. Have you ever designed the extrusion for an aluminum frame sliding door?

A. I have aided in the design of extrusions for a sliding door.

Q. But you yourself have not by yourself designed the extrusions for an aluminum sliding door?

A. Not in its entirety, no.

Q. Now, in your affidavit you say, "To my own knowledge and from my experience as an extrusion engineer"——

Mr. Duque: Where are you reading?

(Testimony of Oscar J. Meyer, Jr.)

Mr. Mahoney: On page 4.

Well, we might start on page 3.

> "In the Los Angeles office my department has made in the past two years more than 1300 extrusion drawings for the manufacture of extrusions for individual customers, and within Reynolds Metals Company there are more than 15,000 individual extrusion drawings. To my own knowledge and from my experience as an extrusion engineer, I know that hundreds of these drawings are similar in shape and design, and in a number of cases, are identical * * *"

When you made that statement you weren't referring, by [259] the word "identical," to the extrusions for the Panador?

A. Identical? No.

Mr. Mahoney: That will be all.

The Court: Any redirect examination?

Mr. Duque: Yes, your Honor.

Redirect Examination

By Mr. Duque:

Q. Mr. Meyer, you have described the changes that you have made in the original drawings which were submitted by Panaview to you. Without the changes which you made in the tolerances and the weatherstripping would the door, in your opinion, have worked?

Mr. Mahoney: Objection, your Honor. The wit-

(Testimony of Oscar J. Meyer, Jr.)

Mr. Duque: I apologize for my ignorance. I just didn't know the phrase, your Honor.

Mr. Mahoney: Will you answer the question?

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Mr. Mahoney: Objection, your Honor. The wit-

(Testimony of Oscar J. Meyer, Jr.)

ness has already testified that he had no guarantee that it would not function.

The Court: This is a different question and calls for a different answer. Overruled.

Mr. Mahoney: Work and function mean substantially the same thing, your Honor.

The Court: There is quite a difference between opinion and guarantee.

Mr. Duque: I am asking for his opinion and not his guarantee, your Honor.

The Court: He may answer. Overruled.

The Witness: Without the changes it is my opinion that [260] the door would not have assembled together.

Q. (By Mr. Duque): Now, you state in your affidavit, Mr. Meyer, that at no time did you ever disclose to anyone or any competitors any of the information which you received from them on that drawing. Did you ever discuss with anybody else outside of the Reynolds Metals Company any of the material that was furnished to you by Panaview?

A. I did not.

Q. Did you at any time ever——

Mr. Mahoney: Your Honor, this line of questioning is objected to on the ground that it is not within the scope of redirect examination.

Mr. Duque: It is in the scope of the direct in that it is in the affidavit.

The Court: It is not rebuttal of the cross, is that what you mean?

(Testimony of Oscar J. Meyer, Jr.)

Mr. Mahoney: It is not proper redirect examination.

The Court: It is not rebuttal of the cross——

Mr. Mahoney: Yes.

The Court: ——so, hence, it is not proper redirect. Sustained.

Mr. Duque: Very well. I have no further questions.

The Court: You may step down, Mr. Meyer.

(Witness excused.)

The Court: How much longer will your evidence be for [261] the defendant, Mr. Duque?

Mr. Duque: We will call Mr. Sargeant and Mr. Hairston, who is now out with Mr. Pinson. And I believe that will conclude our case, your Honor. I would say that it would take not more than an hour, sir.

The Court: Do you anticipate any extended rebuttal?

Mr. Mahoney: No, your Honor.

Mr. Duque: Oh, I am sorry, your Honor. There is one other witness that I do intend to call, and I overlooked him. I intend to call Mr. Gunderson of the Windsor Manufacturing Company. His testimony should be very, very brief. I would say that an hour or an hour and a half would complete our case.

The Court: We should possibly close the evidence by noon tomorrow then?

Mr. Mahoney: We will make an effort to do so, your Honor.

Mr. Duque: Yes, your Honor.

The Court: Very well. We will take the recess at this time until tomorrow morning at 10:00 o'clock.

Mr. Clerk, will you adjourn the Court.

(Whereupon, a recess was taken until 10:00 o'clock a.m. of the following day, November 23, 1955.) [262]

Wednesday, November 23, 1955—10:00 A.M.

The Court: Are there any ex parte matters?

The Clerk: No, your Honor.

The Court: In the case on trial, you may proceed.

Mr. Duque: Your Honor, yesterday afternoon and during the evening Mr. Pinson and Mr. Hairston of the Reynolds Metals Company collaborated on checking the figures which are offered here in evidence as Plaintiff's Exhibit 24 for identification. And subject to our right—well, I might say first that Mr. Hairston does not agree with the figures, but I will withdraw my objection to the introduction of the exhibit subject to my right, when we put Mr. Hairston on the witness stand, to go over these figures and explain what he believes are incorrect in them.

The Court: Very well. Exhibit 24 for identification is now received in evidence.

(The exhibit referred to, marked Plaintiff's Exhibit 24, was received in evidence.)

PLAINTIFF'S EXHIBIT No. 24

Panador Cost Data

8/54 Panador Dept.=1/55

:6'10" Av. Wage=$1.59

(50 Door Run)

t	Amt.	Cost Unit	Total Cost	Labor Hrs.	At 100% Standard	At 60% Standard
	8′	0.25	$ 2.00	.076		
	8′	0.26	2.08	.045		
	14′	0.234	3.28	.164		
	8′	0.288	2.30	.152		
	8′	0.208	1.66	.119		
	14′	0.223	3.12	.227		
	14′	0.24	3.36	.057		
			$17.80	.840		
; up				.050		
tal				.890 @ 1.59	1.42	2.36
ist Cap	1		.017			
mper Assy.	2	.147	.294			
all Bumper	4	.006+	.260			
p Air Barrier	1		.136			
s Jamb	14′	.032	.448			
s Top Rail	8′	.071	.568			
s Bottom Rail	8′	.032	.256			
lers	4	.400	1.60			
t	4	.006	.024			
using	4	.083	.333			
el	4	.043	.172			
y. Screws	8	.078	.624			
ch	1	.191	.191			
ike	1	.047	.047			
ets	2	.003	.006			
cks	4	.21	.84			

Part	Amt.	Cost Unit	Total Cost	Labor Hrs.		At 100% Standard	At 60% Standard
Allen Wrench	1		.02				
w/s Neoprene	7′	.0287	.201				
Vinyl	44′	.035	1.54				
Inst. Screws	16	.0045	.072				
Paper Bag	1	.002	.002				
Cloth Bag	1	.026	.026				
Carton	1	.468	.468	.2	@ 1.85	.37	
			*$ 8.145				
			$25.94				
						$27.73	$28.675

[*Appears in red ink on original copy.]

Received in evidence November 23, 1955.

The Court: What about Plaintiff's Exhibit No. 25, the sales summary?

Mr. Duque: The same thing would prevail with that.

The Court: Very well. Plaintiff's Exhibit No. 25 for identification is received in evidence. [265]

(The exhibit referred to, marked Plaintiff's Exhibit 25, was received in evidence.)

PLAINTIFF'S EXHIBIT No. 25

Inter-House Correspondence

Use This Form for All House Correspondence
Write on One Side of Paper Only

Date: November 14, 1955.

To: Mr Pinson. From: Rose White.

Subject:

Volume of Panador business 1954—$135,995.24.
Volume of Panador business 1955—January thru June, inclusive, $266,849.42.

Received in evidence November 23, 1955.

The Court: And what of the average sales price of plaintiff's door?

Mr. Mahoney: They have also discussed the average sales price based on the total number of doors which were sold during the period consisting of the latter part of 1954 to June, 1955, and they are in substantial agreement on that figure. The total figure for 1954 is 2,142 doors, and the total figure in 1955 is 4,145 doors.

However, it should be explained that in the early part of the sale of the doors in 1954 approximately 200 Panador doors were shipped and invoiced as Panador doors due to failure to get the materials in time to fill certain orders. So at most that would be a disparity between the figures of the plaintiff

and figuers of the defendant of approximately 200 doors.

Mr. Duque: That's correct, your Honor.

The Court: So stipulated?

Mr. Duque: Yes, your Honor.

The Court: Now, what is the average sales price?

Mr. Mahoney: Derived was the figure of $62, plus or minus a few cents, in 1954; and $65, plus or minus a few cents, in 1955.

The Court: In other words, approximately $62 during [266] 1954 and approximately $65 in 1955. Is it so stipulated?

Mr. Duque: Yes, your Honor.

The Court: Very well. That concludes the plaintiff's case in chief, then, does it?

(Whereupon, there was a conference between counsel.)

Mr. Mahoney: Excuse us, your Honor. We are considering another stipulation here.

It is stipulated by counsel here that the acknowledgment on Purchase Order No. P-2502 was received in the plant of the Reynolds Metals Company on approximately February 3rd, 1955, and because of the lack of the records of the Reynolds Metals Company we cannot put into evidence the actual acknowledgment. Is that correct?

Mr. Duque: Yes. The record apparently, your Honor, is not in these records we have here and is either in the Phoenix plant or the Louisville plant. But we will stipulate to that date.

The Court: I don't immediately get the significance of that.

Mr. Mahoney: The significance here, your Honor, is to show that during the period of time when Reynolds Metals was supplying Windsor Supply, the plaintiff had an order in the defendant's plant for extrusions, and that when the incomplete orders were shipped to the plaintiff the defendant was, also, simultaneously shipping extrusions to Windsor Supply. [267]

We rest our case your Honor.

Mr. Duque: May I proceed, your Honor?

The Court: Yes.

Mr. Duque: Mr. Sargeant, will you take the stand, please?

HARRY M. SARGEANT

called as a witness on behalf of the defendant, being first sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Harry M. Sargeant, S-a-r-g-e-a-n-t.

The Court: Mr. Sargeant's affidavit is here, Mr. Clerk?

The Clerk: Yes, your Honor, I think it is.

Mr. Duque: Yes, your Honor, it is Exhibit C, Defendant's Exhibit C.

The Court: Will you place Defendant's Exhibit C before the witness, Mr. Clerk?

(Whereupon, the document was placed before the witness.)

(Testimony of Harry M. Sargeant.)

Direct Examination

By Mr. Duque:

Q. Mr. Sargeant, you have before you the affidavit which was filed in this action on September 14th and which was sworn to by you. Do you have that before you? A. Yes, I do.

Q. Have you read that affidavit?

A. I have. [268]

Q. Are the facts and statements contained in that affidavit true and correct as of this date?

A. Yes, they are.

Q. And would you be prepared to swear under oath as to the facts set forth in this affidavit?

A. I am.

Mr. Duque: You may cross-examine, Mr. Mahoney.

Mr. Mahoney: No questions, your Honor.

The Court: You may step down, Mr. Sargeant.

(Witness excused.)

The Court: Your next witness?

Mr. Duque: I will call Mr. Hairston.

JAMES M. HAIRSTON

called as a witness on behalf of the defendant, being first sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: James M. Hairston, H-a-i-r-s-t-o-n.

The Court: Mr. Hairston's affidavit is Exhibit B?

(Testimony of James M. Hairston.)

Mr. Duque: Yes, your Honor.

The Court: Is it before the witness, Mr. Clerk?

The Clerk: Yes, your Honor.

Direct Examination

By Mr. Duque:

Q. Mr. Hairston, you have before you your affidavit which was filed in this action. Have you read that affidavit? [269] A. Yes, sir.

Q. Do you know the facts therein to be true?

A. Yes, sir.

Q. And would you testify to those same facts under oath? A. Yes, sir.

Q. If so asked? A. Yes.

Q. Thank you. Now, Mr. Hairston, I show you Defendant's Exhibit 24, which is the cost sheet which I believe you reviewed yesterday afternoon and last evening with Mr. Pinson of the plaintiff company. A. Yes, sir.

Q. Will you tell us wherein you disagree with the conclusions that were arrived at by Mr. Pinson in that sheet?

A. Yes, sir. First of all, this, in my opinion, cannot be submitted as an actual cost. At best it is an estimated cost of the Panador.

The Court: It was offered as an estimated cost, was it not?

Mr. Mahoney: Yes, your Honor.

The Court: I understood that was the most plaintiff claimed for it, that it was an estimated cost.

Testimony of James M. Barton.

Mr. Duque: I didn't understand that, your Honor. I understood that they were claiming it to be the actual cost. [270]

Mr. Mahoney: We pointed out that this figure was run at 50 doors at the early time, at the beginning of the production, and that perhaps there would be small differences between these figures and the later production figures. This was the figure run in 1956. So it necessarily would have to be, as to the later doors, an estimated cost.

The Court: I understood that it was offered, not as the precise cost but as the estimated cost. Is that correct?

Mr. Mahoney: That is correct, your Honor.

Mr. Duque: Well, if it is offered as an estimated cost, your Honor, what value is it? If I had understood that—well, I will move at this time to strike it from the record if it is simply an estimate of their cost.

Mr. Mahoney: It is based on a factual basis. An analysis was made of the actual production of the doors and the cost figures actually taken therefrom. The only way in which the figure is an estimate is in that it was taken from a sample of 50 doors, as was pointed out by the witness when the exhibit was presented. Obviously you cannot maintain a cost control on a continuous series of doors, and there has been some sampling to obtain a cost figure and this is consistent with approved procedure.

Mr. Duque: Well, I move to strike the document, your Honor, on the grounds that it is incom-

(Testimony of James M. Hanson.)

petent, irrelevant and immaterial and does not tend to prove or disprove any issue [271] in this case, if it is simply an estimate.

The Court: Well, it tends to prove the cost of producing these doors by plaintiff, doesn't it? Doesn't your objection go to the weight rather than the admissibility?

Mr. Duque: I suppose it would, your Honor.

The Court: Overruled.

Mr. Duque: May I interrogate the witness with regard to this?

The Court: You may. I merely interrupted in the interest of time.

Mr. Duque: Thank you.

Q. (By Mr. Duque): In reviewing the Panador Cost Data records, which you did yesterday with Mr. Pinson, do their entire records support that estimated cost which appears on Exhibit No. 24?

A. Insofar as the records that were available they do. Such records as I reviewed were the metal costs, input metal costs to their plant. And we selected a few of the purchase parts which they have included here, and we found minor differences. But the grand total is so insignificant, the total of the parts is so insignificant to the total costs, that I believe that it would be reasonable to that extent.

Q. Does that document reflect any overhead?

A. No, sir. This document is a direct cost margin [272] approach to a costing of a product. It has no overhead at all contained in it.

(Testimony of James M. Hairston.)

Q. And is a direct approach the customary approach in arriving at cost?

A. Only for certain purposes.

Q. For this purpose?

A. Not for determining the cost of a product.

Q. So that this method of arriving at this cost which appears in that document is not the customary accounting method to use, is that correct?

A. Not to establish what I would say would be a profit and loss statement on this particular product.

Q. Now, Mr. Hairston, there has been stipulated in this case that a die charge was made for the production of the manufacturer of the dies which were used to produce the extrusions for Panaview. And that stipulated amount is——

A. $1430, I believe.

Q. $1435? A. $1430.

Q. $1430? A. Yes, sir.

Q. Now, do you know what the actual cost of producing that die was to the Reynolds Metals Company? A. Each one? Yes, sir.

Q. I mean the cost of each of the dies. [273]

A. Yes, sir.

Q. Will you tell us what those costs are, please?

A. Would you want it by die, or would you like the total that would be comparable to the total invoice?

Q. I think you should give us the total figure and then break it down by dies.

(Testimony of James M. Hairston.)

A. The total cost of the nine dies which were originally produced in order to comply with the section orders from Panaview was $3,176.06.

Q. Now, would you break that down?

A. To what extent, sir?

Q. What did you give as the total cost?

A. $3,176.06. That includes the cost of the die block or metal needed to make the die and the—only the labor of the actual manufacturer of the die.

Q. I see.

Now, Mr. Hairston, in your capacity as controller of the extrusion plant in Phoenix, do you know the practice of the Reynolds Metals Company in connection with the use of dies which are made for extrusions of one customer and the use of those dies for another customer? A. Yes, sir.

Mr. Mahoney: This question is objected to, your Honor, on the grounds that it is incompetent, irrelevant and immaterial. A stipulation was made that the custom and usage [274] would not be brought into evidence here.

Mr. Duque: I am not attempting to show custom and usage. The plaintiff has attempted, by introduction of certain records here of Windsor Supply Company, to indicate what is the practice of the Reynolds Metals Company in connection with the use of its dies which are made to extrude extrusions for one company in using those dies for another customer. And I am asking him not what is the custom and usage in the trade but what is

(Testimony of James M. Hairston.)

the practice of the Reynolds Metals Company to rebut the testimony that has been put in by plaintiff.

Mr. Mahoney: There has been no foundation laid by the plaintiff to show that we knew anything about the internal practice of the defendant whatsoever.

The Court: Sustained.

Mr. Duque: Well, your Honor, my notes indicate—and I could be wrong and probably am—but my notes indicate that there was testimony that has been adduced in this case which purports to show that it was the practice of the Reynolds Metals Company in its internal operation to only use the dies that it made to extruded extrusions for Corporation A for that corporation, and to never use the dies to extrude extrusions for any other corporation.

Now, if there is no such testimony then obviously this is irrelevant. But I was offering it to rebut that and to show what the practice of the Reynolds Metals Company is [275] and has been for some time with regard to the use of dies which it owns and upon which only a service charge is paid by the customer.

That is the only purpose of it. If I am in error and there is no such contention or no such claim——

Mr. Mahoney: I don't think Mr. Duque is in error as to the testimony, but the distinction here is between what was told the plaintiff by representatives of the defendant and what was the internal

(Testimony of James M. Hairston.)

practice of the defendant, with which the plaintiff could not possibly have been cognizant.

The Court: Well, unless you expect to show that it was brought home to the plaintiff in some way——

Mr. Duque: Pardon me?

The Court: It seems to me that it is self-serving unless you could tie it up to the plaintiff in some manner so as to show that this was brought home to the plaintiff, knowledge of this.

Mr. Duque: We already have shown that it was brought home to the plaintiff, your Honor, by the introduction of Plaintiff's Exhibit No. 2.

The Court: You are relying upon the written statements on the reverse side of the order, are you, the invoice?

Mr. Duque: I am relying on that; but I am attempting to rebut any alleged other practice which may have lulled the plaintiff into a sense of security, or done something to [276] them.

The Court: Well, the most that the plaintiff has here is the testimony, as I recall it, that a certain representative of the defendant told the plaintiff certain things with respect to what the defendant did with dies. Is that correct?

Mr. Mahoney: That is correct, your Honor.

The Court: Now, if that was a departure from practice, it would be immaterial unless that practice had been brought home to the plaintiff. And any practice would not rebut, would it, the statement made, if it was made?

(Testimony of James M. Hairston.)

Mr. Duque: Well, the statement obviously was not made by Mr. Hairston or anybody else of the defendant, and that's set forth in all the affidavits.

The Court: Very well. Then that serves as rebuttal to the evidence that there was such a statement made——

Mr. Mahoney: Your Honor, I will say nothing.

The Court: ——but the practice would not, as Mr. Mahoney points out.

Do you have something to say?

Mr. Mahoney: I will say nothing about it. We will let it stand.

The Court: Sustained.

Q. (By Mr. Duque): Mr. Hairston, referring back to Exhibit No. 24, does this estimate include any sales expense? A. No, sir. [277]

Q. Are there any other costs that are omitted from the estimate?

A. Yes, sir. The only costs that are included here are the so-called direct costs, which includes material and direct labor.

Q. What are the other costs that are customarily included?

A. All overhead items, beginning with indirect labor; light, power, depreciation, supervision, miscellaneous supplies, payroll taxes, insurance, employee benefits, fringe benefits. Likewise, it is normal to apply your selling and administrative—or, general and administrative expenses to a production line. These are not indicated in this report.

The Court: "This report" being exhibit——

(Testimony of James M. Hairston.)

Mr. Duque: Exhibit 24, your Honor.

Will your Honor bear with me for a moment?

The Court: Yes.

Mr. Duque: No further questions of this witness, your Honor.

Cross-Examination

By Mr. Mahoney:

Q. Mr. Hairston, have you made any estimate as to the probable additional costs which should be added to the figures which appear in Plaintiff's Exhibit No. 24? [278] A. Yes, sir. I have.

Mr. Mahoney: Mr. Duque, would you kindly produce those notes?

The Witness: Those that I just—the yellow sheets, Mr. Duque?

Mr. Mahoney, they are stated in that work sheet as percentage of net sales, since your records do not permit any other basis of allocation of overhead and these other expenses.

Mr. Mahoney: Your Honor, at the present time the question of materiality of the introduction of the additional figures such as overhead and selling costs is raised, and if your Honor desires we can produce the evidence on behalf of the plaintiff as to such figures. But we think the measure here is the actual cost, the actual figure which if the direct labor and the direct costs of raw materials, plus the assembly thereof, including the packaging of the product as it leaves the plant.

(Testimony of James M. Hairston.)

Now, if your Honor feels that as a matter of law the overhead figures should be presented to state a complete case on cost to the plaintiff of each door, then we can present these figures. And we will also present, without being bound thereby, the tentative figures arrived at by Mr. Hairston.

The Court: Are you willing to accept these figures, subject to check? [279]

Mr. Mahoney: Well, your Honor——

Q. (By Mr. Mahoney): Mr. Hairston, these are merely estimates, aren't they?

A. Those based on your financial statement for the period of January 1st through February 28th, your profit and loss percentage figures, which I assume to be true and correct, as a normal basis for approaching it due to the fact that your records, your cost records do not segregate your costs in any way that I could compare or make any analysis of the cost to be allocated to that particular product.

Mr. Mahoney: Well, you see, this is an important point, your Honor, because the testimony of the plaintiff would indicate that this product took a surprisingly small percentage of the entire overhead of the Panaview company. And as you can see from the total labor costs it was a relatively small expenditure. There was a relatively small expenditure of time and labor and relatively small space for production of the large number of doors. So the overhead figure is not necessarily to be reflected from the financial statement because, as Mr. Hair-

(Testimony of James M. Harrison.)

stun says, there was a commingling of the products on the financial statement. Is that correct?

The Witness: Absolutely no segregation.

The Court: Well, it would be a matter, in any event, of arbitrary allocation of overhead, would it not?

The Witness: Yes, sir. To my knowledge there is no [280] firm and concrete method of allocating certain overhead items.

Mr. Maloney: I think the testimony of Mr. Pinson would be indicative of the manner in which this arbitrary allocation was made.

The Court: Would you want to state it percentagewise what proper business and accounting practice would call for in the way of allocation of overhead?

The Witness: Yes, sir, I can give you one of the accepted practices which——

The Court: The practice, in your opinion, that should be applied here.

The Witness: A normal method found, I believe, would possibly be applied on a pro rata basis against the sales dollar—your plant overhead generated within the plant or in the manufacturing operations normally are related to direct labor and/or direct labor and materials. Certain direct overhead items could very easily be allocated. But their particular cost system or accounting system does not furnish any basis at all for making any allocation——

The Court: Of general overhead?

The Witness: Of general overhead.

(Testimony of James M. Hairston.)

Q. (By Mr. Mahoney): Is it true, Mr. Hairston, in an established plant there could remain fixed such things as rent, lights and other factors such as that when a new product [281] was brought in and that the allocation of such fixed factors would not alter the fact that there had been no increase in these overhead figures?

A. In a general manner your statement is probably correct. But normally, in bringing in a new product, it also requires additional tooling and equipment and other items that in some instances become fixed assets; also, probable additional supervision.

Mr. Mahoney: Then, your Honor, I think that rather than accepting this estimate of the defendant the plaintiff should probably put on direct testimony as to the overhead situation here.

The Court: You wish to recall Mr. Pinson for that purpose?

Mr. Mahoney: Yes. We will recall Mr. Pinson.

The Court: Any further questions of Mr. Hairston?

Mr. Mahoney: One moment, your Honor.

Q. (By Mr. Mahoney): Mr. Hairston, referring to page 4, lines 13 to 23, of your affidavit——

A. I am sorry. I can't find it quickly here.

Mr. Mahoney: Don't hurry yourself.

The Court: Mr. Clerk, will you assist the witness?

(Whereupon, the document was handed to witness.)

(Testimony of James M. Hairston.)

Q. (By Mr. Mahoney): It's page 4, lines 13 to 23.

A. What page was that, Mr. Mahoney? [282]

Q. Beginning on page 4, lines 13 to—well, lines between 12 and 13 and between 22 and 23.

A. Yes, sir.

Q. Now, in this paragraph you state,

"* * * it is not true that extrusions were diverted by us * * *"

And by "us," I presume you mean the extrusion department of the Reynolds Metals Company. Is that correct? A. Yes.

Q. "* * * to Windsor Supply, Inc., or any other competitor of plaintiff."

On what do you base that statement?

A. On the records in my location.

Q. Do you have those records with you?

A. Yes, sir. I have a considerable number here that I believe I can substantiate that statement.

Q. Were you supplying Windsor and Panaview at the same time with these extrusions?

A. In effect, yes. We were supplying the parts. We were supplying the parts division, who, in turn, were supplying Windsor——

Q. In other words, as an internal operation, the extrusions went from the extrusion department to the parts division for Windsor——

A. Yes, sir. [283]

Q. ——and the extrusions went out directly from the extrusion department to Panaview for Panaview, is that correct? A. Yes, sir.

(Testimony of James M. Hairston.)

Q. Now, how do you explain then that during the period extended generally from the initiation of the sales and shipment of extrusions by Reynolds to Panaview there were numerous times when incomplete orders were sent, incomplete to such an extent that complete doors could not be shipped in KD condition by Panaview?

A. To answer your question, sir, I will have to give a little explanation of my system and try to make it as briefly as possible. It is generally contained in my affidavit here. But immediately upon scheduling an order on an item to be produced in our plant, we produce a master lot ticket which identifies that product with the customer order item. Once that product or material is assigned to that lot ticket it must follow through our normal operations as laid out on the lot ticket until it is ultimately completed and shipped to the customer. It is virtually impossible for us to cross-supply once the product is going through the plant. And if it was cross-supplied it would have to be noted on our document that we use to attempt to control production in our plant. We have approximately 8,000 products going through our mill at any one time. We are on a job lot cost [284] system, or job lot system, and we process materials by batches and in order to maintain any control at all we must keep those batches together.

Q. Then would you say that by the acceptance of orders from Windsor Supply Company and the

(Testimony of James M. Hairston.)

fact they had a prior lot ticket on them the orders for Panaview were necessarily delayed?

A. No, sir.

Q. In other words, if there were an order for Windsor Supply Company in the plant and it was being processed, you would immediately remove that order from process and put the Panaview order through?

A. I am sorry. I don't believe you understand our operation, sir. That would not affect the timing or the delivery schedule of any other order or item in our plant. We can't simply remove an item from the schedule and——

Q. If you can't remove the prior Windsor order from the schedule, if it is being run through the plant, then that means that the Windsor order has to be completed before the Panaview, the production on the Panaview order is initiated?

A. That is not exactly true, either.

Q. Is it true in part?

A. Yes, I am sure that that could happen.

Q. In what respect is it not true? [285]

A. Well, a product such as these that we are speaking of must go through about five different operations. Some of it is timed by the nature of the operation requiring a certain amount of time. It does not mean, however, that the two particular—assuming we have an order for a die section from Windsor and a section from Panaview, we have more than one machine which would handle that one order. We have a multiple grouping of equip-

(Testimony of James M. Hairston.)

ment through which either of these sections or orders could be processed, either simultaneously or in consecutive order or whatever way they happen to hit in the mill schedule.

Q. In other words, though, it could happen, using your own phraseology in a situation, that an order for Panaview could be delayed because of the fact that an order for Windsor was already in the plant?

Mr. Duque: I object to that as being purely hypothetical.

The Court: It is argumentative.

Q. (By Mr. Mahoney): You have previously stated that it was partly true that an order for Panaview could be delayed by the fact of the lot ticket situation on the passage of orders through the plant. Is that correct?

A. Yes, only under some very limited circumstances.

The Court: Do you have more than one set of these extrusion dies? [286]

The Witness: Yes, sir.

The Court: That were built for Panaview?

The Witness: In this particular case we do, sir.

The Court: You had more than one set of them?

The Witness: Yes. Except for two of their dies, or sections, we have duplicated each of them. And in some instances more than two.

Q. (By Mr. Mahoney): These bear Panaview's die numbers?

(Testimony of James M. Hairston.)

A. They bear a die number that is the same as the Panaview, yes.

Q. So there is no distinction whatsoever between these sets of dies, as to die number, which originally appeared on the Panaview order?

The Court: The reason I asked the question if there were only one set of dies is that I should assume that they were being used on one order, if that were so, they couldn't be at the same time used on another order. But if you had more than one set of dies, would there be any reason why the order of one customer would delay the other?

The Witness: None whatsoever. And in addition, in our normal method of operation, if we can group orders for processing where one of our major expenses is setting up the die in the press—it requires approximately an hour's time, which is a critical operation, and if there is any possible way of grouping orders it would act to their [287] benefit. We would try to run as many pounds through that particular die as it was possible to do.

Q. (By Mr. Mahoney): Can you explain then how during the time Reynolds Metals Company was selling extrusions or shipping extrusions to its parts division for further work and shipping extrusions to Panaview, it was necessary for Reynolds Metals Company to ship incomplete orders?

A. Yes, sir. That seems to be one of the plagues of the extrusion industry. Our promise date performance in our plant, up until last month, has been 60 per cent meeting the original promised date.

(Testimony of James M. Hairston.)

Now, there are many reasons that cause that. Failure of the product somewhere through its processing. Maybe it's processed all through down to the final inspection and we find that it doesn't meet physical test requirements or other tolerances that are specified. In that instance the material has to be scrapped and we have to start over. It is a regrettable thing, but it is normal.

Q. Now, when you say in your affidavit, "* * * it is not true that extrusions were diverted by us to Windsor Supply Company, Inc., * * *" what do you mean?

A. Well, I assume that the "diversion" or at least my implication of "diversion" means that any instance where we may have had in the mill material being processed against a Panaview order and then for some reason diverted—taken [288] from a particular lot and assigned to the Reynolds Metals Company for Windsor.

Q. Do you know of your own knowledge whether, at the time Panaview was receiving incomplete shipments, Windsor was receiving complete shipments of extrusions from the parts division?

A. That is a difficult question to answer directly. I would have to make a certain assumption, based on our normal operation, that they were suffering shortages as any other——

Q. But you don't know they were suffering shortages.

A. Yes. I think I can indicate or show that

(Testimony of James M. Hairston.)

from the shipping records against the parts division, or the material ordered from Windsor, that it was being shipped in generally the same quantities or percentages of the original order as was Panaview. The items were not being shipped complete at the day or week promised. There were multiple shipments against each item. And from that I can only point out that that indicates a normal——

Q. Well, do you know whether when a shipment was shipped to Panaview and during the same period a shipment was shipped to Windsor that there wasn't present in a Windsor order extrusions which were lacking from the Panaview order, thus rendering the Panaview order incomplete?

A. It is entirely possible that would be so. I point out again that we have some 8,000 products going through the [289] mill, and we may have five or six of the identical product in the shipping department being shipped to different customers. We make no effort to try, or to say, "We will take from this customer and let him go completely without so we can fill this order." We ship them as the master lot ticket indicates that order is to be shipped. All of our case tickets are prepared with that information on it.

Mr. Mahoney: That will be all.

Mr. Duque: No redirect examination.

The Court: You may step down, Mr. Hairston.

(Witness excused.)

Mr. Duque: Mr. Gunderson, will you take the stand, please, sir?

RAYMOND GUNDERSON

called as a witness on behalf of the defendant, being first sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Raymond Gunderson.

Direct Examination

By Mr. Duque:

Q. Mr. Gunderson, what is your occupation, sir?

A. Self-employed.

Q. And were you at one time employed by the —well what was your last prior employment?

A. I was employed by the Windsor Manufacturing Company? [290]

Q. How long were you employed by them, over what period of time?

A. Approximately two years.

Q. In what capacity? A. As president.

Q. And in the capacity as president of the corporation did you have knowledge of its sales and operating problems? A. I did.

Q. During that period of time was Windsor Manufacturing Company doing business with the plaintiff in this action, Panaview?

A. Yes, sir.

Q. Will you tell us what the nature of your business dealings were with Panaview during that period?

(Testimony of Raymond Gunderson.)

A. The Panaview company manufactured products under the Windsor Manufacturing label which we offered for sale to our customers.

Q. In other words, Panaview would furnish you with a complete knocked-down door which you would buy from them and then you would put your label on it and sell it to your customers?

A. Yes, sir.

Q. Was one of your customers the W. P. Fuller Company? A. Yes, sir.

Q. To your knowledge, during that period of time was [291] W. P. Fuller a customer of the Panaview company? A. No, sir——

Q. It was not? A. ——to my knowledge.

Q. Now, during this same period of time was your company, Windsor Manufacturing, doing business with the Reynolds Metals Company?

A. No, sir.

Q. You at no time did any business with the Reynolds Metals Company? A. No, sir.

Q. Have you ever been connected with any organization that did business with the Reynolds Metals Company? A. Yes, sir.

Q. Would you please state the name of that organization?

A. I will have to qualify it just a little bit.

Q. Please do.

A. Prior to Windsor Manufacturing, I was employed by Windsor Supply Company, and Windsor Supply Company, I believe over the years has done

(Testimony of Raymond Gunderson.)

business with Reynolds Metals Company. So that would be one case.

After leaving Windsor Manufacturing as an employee and becoming assistant to the man who owned Windsor Supply Company, I was, well, semi-remotely connected with their [292] operations and Windsor Supply Company was certainly doing business with the Reynolds Metals Company.

Q. When you say you were assistant to the man who owned Windsor Supply Company, to whom do you refer? A. Mr. C. A. McLin.

Q. And he was the principal owner of the Windsor Supply Company and also Windsor Manufacturing Company? A. That is correct.

Q. At any time during your employment either with Windsor Supply or with Windsor Manufacturing Company, or as assistant to Mr. McLin, do you know of any occasion when Reynolds Metals Company sold to either of those corporations any assembled knocked-down doors ready for resale?

A. No, sir.

Q. You do not know of any such occasion?

A. I do not.

Q. Now, Mr. Gunderson, it has been testified here that at one time you and Mr. McLin and Mr. Reznick, who is one of the operators of the plaintiff in this case, had a conversation as, I believe it was Panaview's office—no, it was in Pasadena in late 1954. Do you recollect being in such a meeting with Mr. McLin, Mr. Gunderson, and Mr. Reznick?

A. I do.

(Testimony of Raymond Gunderson.)

Q. Now, it has been testified here that, in substance [293] Mr. Reznick—also present was Mr. Pinson, I believe, is that correct?

A. Yes, I believe he was there.

Q. Now, it has been testified here that Mr. Reznick told Mr. McLin that he would have to pay their past due account right away. And then Mr. McLin, in substance, told Mr. Reznick that he didn't have to do business with Panaview and that he would take measures to protect himself, and that in two weeks he could have another source of supply of doors.

Mr. Mahoney: Your Honor, the phraseology of the question does not appear to be in conformity with the facts. My recollection of the testimony is that Mr. McLin is reported to have stated that he had taken measures to protect himself.

Mr. Duque: Maybe I can do it by asking the winess what the conversation was.

The Court: That would be the proper way.

I assume this is not an impeaching question for which a foundation was laid as to the witness. It is offered only to impeach him by remarks and not by showing a prior inconsistent statement.

Mr. Duque: That is correct.

The Court: Why not ask him what the conversation was.

Q. (By Mr. Duque): Will you tell us what took place at that conversation at that meeting, what was said by Mr. McLin and what was said by Mr. Rez-

(Testimony of Raymond Gunderson.)

nick and you and Mr. Pinson, to [294] the best of your recollection.

A. Mr. Reznick and Mr. Pinson appeared at that meeting with a statement which showed that Windsor Manufacturing Company owed X amount of dollars—it escapes me for the moment, but I believe it was somewhere in the neighborhood of $13,000—and for which they asked payment. It was Mr. McLin's contention that certain credits were forthcoming from the Panaview company and that until they had been adjudicated one way or the other I think he said he would not pay the bill.

However, he did indicate that he would like to continue doing business with Panaview through Windsor Manufacturing Company on the basis under which they had operated in the past. And he did make the statement, to my recollection, that because of certain doubts that he had about the ability of that arrangement to continue he had taken steps to protect himself and that he had placed sizable orders for material which could be used to construct a sliding patio door; and that as far as he was concerned he had never particularly wanted to be in the sliding door business from a manufacturing point of view, so that if he and Mr. Reznick could agree on some program for the future he would gladly release whatever metals he had contracted for and resume the operation as it had previously been worked.

Q. (By Mr. Duque): Did he at any time in that conversation [295] ever tell Mr. Reznick or

(Testimony of Raymond Gunderson.)

anybody else that he intended to buy knocked-down doors ready for the retail market from Reynolds Metals Company?

Mr. Mahoney: Your Honor, this question is leading and suggestive.

The Court: Overruled.

The Witness: Terminology, now, I guess is important. I think Mr. McLin said, "We are not going to be put out of the sliding door business, and we will manufacture sliding doors."

Whether he said that he would buy extrusions with secondary operations performed upon them is something that I cannot remember.

Mr. Duque: That is all. No further questions.

Pardon me, just a moment. I have one further question.

Q. (By Mr. Duque): At any time that you were associated with Windsor Manufacturing or with Windsor Supply or Mr. McLin, did Reynolds Metals Company ever disclose to you or to anybody connected with any of those organizations any of the designs of Panaview in connection with their Panador, or any other door?

A. I can't speak for the rest of those organizations. I can only speak for myself. But never were they disclosed to me.

Q. And so far as you know of your own knowledge never [296] to anyone else in your organization? A. That's right.

Mr. Duque: That is all, your Honor.

The Court: Any cross-examination, Mr. Mahoney?

Mr. Mahoney: No cross-examination, your Honor.

The Court: You may step down, Mr. Gunderson.

(Witness excused.)

Mr. Duque: Your Honor, may we have a short recess before determining whether we are going to rest at this time?

The Court: Very well. We will take the morning recess at this time of five minutes.

(Short recess.)

Mr. Duque: The defendant rests, your Honor.

Mr. Mahoney: Your Honor, plaintiff would request that Mr. Pinson be returned to the witness stand to give his testimony on the question of overhead.

The Court: This is reopening of the case in chief?

Mr. Mahoney: Reopening of the case in chief, your Honor.

The Court: Very well. You may recall Mr. Pinson for further direct examination on the case in chief of the plaintiff.

LOUIS PINSON

a witness called on behalf of the plaintiff, having been previously sworn, resumed the stand and testified as follows:

The Clerk: Just be seated. You have been sworn. [297]

Direct Examination

By Mr. Mahoney:

Q. Mr. Pinson, do you have with you at the present time the records relating to other factors than direct cost which would constitute overhead allotted to the manufacturer of the Panador sliding door?

A. Yes, sir. I have the profit and loss statement for this critical period—for a period within the critical period.

Q. Now, from that statement could you ascertain the cost of tooling?

A. We have not separated our tooling costs for the Panaview, Panador and Panaview window, for those three products. They are all grouped as burden overhead, tooling burden for the entire operation.

Mr. Duque: May I inquire of the counsel, is the witness testifying from a profit and loss statement? If so, may I see it before he testifies?

Mr. Mahoney: What we are trying to ascertain here is whether this particular profit and loss statement would enable him to give accurate testimony as to overhead before we——

(Testimony of Louis Pinson.)

Q. (By Mr. Mahoney): Would your profit and loss statement then enable you to break down the cost of tooling on the Panador as distinguished from the other items?

A. No, it would not. [298]

Q. But do you have records available to you at your plant and in your offices which would enable you to do this?

A. Only the most exhaustive search would enable us to segregate the tooling costs of the Panador from all of our tooling costs.

Q. Can you estimate from your own knowledge what the costs of tooling for the Panador were?

Mr. Duque: If the Court please, I object to the question on the grounds it calls for the conclusion of the witness, and is speculative. There are no records here. He says that he hasn't got any records and that it would require an exhaustive search. So I would assume that his estimate would be a speculative estimate, or a guess.

The Court: Does the profit and loss statement show an expense item "cost of tooling" or "cost of all tooling"?

The Witness: Yes, your Honor.

The Court: Do you have an opinion, from your experience, as to what portion or percentage of the total would properly be attributable to the Panador tooling?

The Witness: Yes, your Honor.

The Court: What is that opinion?

(Testimony of Louis Pinson.)

The Witness: I would have to derive this opinion from our——

The Court: You may explain it later.

Let me ask you this first: In carrying on your accounting [299] procedures, have you in the past allocated a certain portion of the tooling cost to the Panador and to other products?

The Witness: The allocations to our journal?

The Court: I mean, have you done that in the past? Have you sat down to see how much you made on the Panador operation, for example, and said, "We will allocate so much percentage of the tooling cost"?

The Witness: No, your Honor.

The Court: You have never done that?

The Witness: No.

The Court: Now, my question is, do you have an opinion as to what proportion or percentage of the total tooling cost should properly, under normal businesslike and proper accounting procedures, be allocated to the Panador tooling?

The Witness: Yes, your Honor, I have such an opinion.

The Court: That is, to the Panador tooling cost. What is that?

The Witness: My opinion is that approximately 20 per cent of our total tooling cost as reflected—not in our profit and loss statement, since this statement does not cover the period at which time we did our main tooling—but 20 per cent of our total

(Testimony of Louis Pinson.)

amount of our capital investment in tooling is represented by the Panador line.

The Court: Well, you mean by that to say that in your [300] opinion one-fifth of all the tooling costs are incurred in the tooling costs on the Panaview door?

The Witness: On the Panador.

The Court: The Panador.

The Witness: Yes, your Honor. I believe that would be a reasonable estimate.

The Court: Is that your best estimate?

The Witness: It is the best one that I can make under the limited time available.

The Court: You may proceed, Mr. Mahoney.

Q. (By Mr. Mahoney): Now, Mr. Pinson, when you initiated the manufacture of the Panador, did you acquire any new buildings to accommodate this operation? A. No, we did not.

Q. How did you handle the manufacture of the Panador in your already established building?

A. We used the Panador through the same flow lines that our Panaview door followed. In other words, it occupied the same physical space within our plant. And when there wasn't sufficient "down" time of our machines during the daytime to accommodate the full number of Panadors we wished to run, we set up a second shift.

Q. Now, what about your percentage of sales expenses on the Panador?

A. Our sales expense for the Panador line was very [301] minimal. Our principal customer——

(Testimony of Louis Pinson.)

The Court: What proportion, what percentage of the total sales expense. Is that what you want?

Mr. Mahoney: That is correct.

The Court: Just ask him that. I will permit him to answer that.

Q. (By Mr. Mahoney): What percentage of the total sales expense which was incurred by Panaview was attributable to the Panador? Can you determine that from the profit and loss statement?

A. Again, let me point out to your Honor that it would be difficult to——

The Court: I understand it is difficult. Do you have an opinion?

The Witness: Yes, I do.

The Court: What is that opinion?

The Witness: My opinion is that it would represent approximately 10 to 15 per cent of our sales expense.

The Court: Of the total?

The Witness: Of the total sales expense.

The Court: I want to be clear. By that I understand you to say that it is your opinion that of the total sales expense incurred by the plaintiff 15 cents on the dollar would be incurred in promotion of sales of the Panador?

The Witness: That is true, your Honor. [302]

Mr. Mahoney: Excuse me a minute.

The Witness: May I amend that last answer just for the purpose of clarification? Naturally our sales expenses and all of our overhead burden expenses are much higher on the first group of doors

(Testimony of Louis Pinson.)

we produce, or the smaller number of doors we produce. We have a total, approximately, of 6,000 doors produced during this particular period under discussion, and naturally these expense figures must be higher for the first group of doors and would be considerably lower, perhaps, for the last group of doors. I tried to strike an average figure for the entire 6,000 units.

The Court: Is the profit and loss statement upon which the witness bases his estimate in evidence?

Mr. Mahoney: We are going to attempt to put it in, your Honor.

Would you please mark this for identification as Plaintiff's Exhibit No. 26?

(The exhibit referred to was marked Plaintiff's Exhibit 26 for identification.)

Q. (By Mr. Mahoney): I show you Plaintiff's Exhibit No. 26 for identification, which includes a statement of assets and liabilities, and a profit and loss statement from the date of January 1, 1955, to February 28, 1955, of the Panaview Door & Window Co., and ask you if you are familiar with that, with Plaintiff's Exhibit No. 26 for identification? [303]

A. Yes, I am. I am familiar with it.

Q. Now, from the figures which are set forth in the profit and loss statement, can you derive, on the basis of your opinion as to percentage, the approximate overhead on the Panador sales?

Mr. Duque: If the witness is to testify from this

(Testimony of Louis Pinson.)

document, may I examine him on voir dire as to who made it and what it is?

The Court: Is there any question about the authenticity?

Mr. Duque: I don't know, your Honor. I don't know whether it was made by Panaview or by a certified public accountant or by an outside accountant. If it was made by Panaview it is obviously a self-serving document.

The Court: You may examine him on voir dire.

Mr. Duque: Mr. Pinson, the document that you hold in your hand, Exhibit 27 for identification——

The Court: That is No. 26.

Mr. Duque: I beg your pardon. Exhibit No. 26 for identification. Could you tell us by whom that was made?

The Witness: Yes, sir. This was made by—this document came out just at the time we were changing our auditors. This was either the last document made by our previous auditor, Mr. Henry Serlin, S-e-r-l-i-n, a CPA of Los Angeles, or it was the first statement prepared for us by Mr. Harry Isenberg of David Belinkoff & Associates, Los Angeles. [304]

Mr. Duque: Thank you, your Honor.

Mr. Mahoney: Will the reporter please read the question previously directed to the witness?

(Question read.)

The Court: That is just a mathematical operation, isn't it?

(Testimony of Louis Pinson.)

Mr. Mahoney: Yes, your Honor.

The Court: It would be 15 per cent of the total sales cost shown on the profit and loss statement, would it not?

Mr. Mahoney: That is correct.

The Witness: That is exactly the way I would approach it, your Honor.

The Court: Well, let the lawyers do the arithmetic. Or, you can do it for them later on.

Mr. Mahoney: Your Honor, I now offer in evidence Plaintiff's Exhibit No. 26 for identification.

Mr. Duque: To which we object, your Honor, on the grounds that it is incompetent, irrelevant and immaterial; doesn't tend to prove any of the issues in this case, and no proper foundation has been laid. And it does not in any way prove the element of damages in this case.

The Court: Do you wish the accountant brought here?

Mr. Duque: Pardon me?

The Court: Do you wish the accountant brought here to say it was prepared by him? [305]

Mr. Duque: I don't mean that.

The Court: What foundation are you objecting to?

Mr. Duque: That is a statement, your Honor, of two months only. It is not a statement of the entire period.

The Court: That goes to its weight, doesn't it?

Mr. Duque: I suppose it would, yes.

(Testimony of Louis Pinson.)

The Court: If there is no objection to the authenticity or——

Mr. Duque: I do not object to that.

The Court: Very well. The objection will be overruled. Exhibit No. 26 for identification is received in evidence.

(The exhibit referred to was marked Plaintiff's Exhibit 26 and received in evidence.)

Mr. Mahoney: Your Honor, we are faced here with the problem of evidently having to produce these voluminous records once again that Mr. Pinson has referred to, and, as on the question of the cost, the direct cost of producing the Panador, the summary prepared by Mr. Pinson was received in evidence, and this also poses the question as to whether, in order to carry the burden of proving our overhead and to satisfy defendant in this regard, we must produce all of our records in the period extending from September, or August, 1954, to and including the present time.

The Court: Well, Exhibits 24 and 25 have gone in without objection, have they not? [306]

Mr. Mahoney: Those show sales——

The Court: Exhibit 24 shows production costs and Exhibit 25 the sales summary.

Mr. Mahoney: And Exhibit 26 shows the percentage of overhead attributable to those sales in a specific period, and could be prorated through the entire period.

(Testimony of Louis Pinson.)

The Court: Don't you have a statement showing your profit and loss covering the period in question?

Q. (By Mr. Mahoney): Do you have a statement showing the profit and loss for the entire period extending from August, 1954, to and including the present time in your records?

A. We have a statment ending June 30, 1955; from January 1, 1955. I can't recall from my memory whether I have broken up the 1954 statement to extend from the particular date in August through December 31st.

The Court: Can you do so?

The Witness: Not within reasonable limits, unless I should happen to have one. In other words, I couldn't make one. If I have such a statement in my possession in my records, I could produce it, yes.

The Court: Do you have it with you here in court?

The Witness: No, I do not.

Mr. Mahoney: Could you obtain that record before this afternoon, the January to June profit and loss statement?

The Witness: Yes. [307]

Q. (By Mr. Mahoney): Could you produce the January to December, 1954, profit and loss statement? A. The 1954—the entire year?

Q. The entire year. A. Yes.

Q. Mr. Pinson, is it your opinion that the amount of tooling which was purchased, as distinguished from machines, Panaview for the Panador

(Testimony of Louis Pinson.)

project was a large or small amount of tooling in dollar value?

A. I am sorry. I don't quite get the question.

Q. Was the amount of tooling purchased by Panaview for production of the Panador in dollar volume a large or small amount of tooling?

A. It was a relatively small amount of tooling in dollar volume.

Q. And was this tooling adapted for use on the machines and other equipment such as fixtures which were already in possession of Panaview?

A. That is true.

Q. And which were utilized on the other products of Panaview? A. That is true.

Q. So that did you then have to make any significant capital investment in machines for Panador Manufacturing? A. No, we did not. [308]

Q. And your tooling costs were relatively low?

A. The tooling costs were relatively low.

Q. What is your opinion as to the sum total of those tooling costs?

A. I'd rather not give the dollar figure.

Q. What was the range? Low in the four figures, or high? A. Low in four figures.

Q. Now, on your sales to Windsor Manufacturing Company, were there any significant sales costs involved in there?

A. There were virtually no sales costs involved with the Panador because we had already established modus operandi with the Panaview and merely carried that on.

(Testimony of Louis Pinson.)

Q. Now, when you initiated your sales directly to distributors were these the same distributors which had already been established for the other products of Panaview?

A. Yes. Our regular distributors carried our additional Panador line, and we did not add any special distributors to carry this line.

Q. Was there considerable initial or continuous sales expense therefor allotted to the sales of the Panador directly to your own distributors?

A. There was almost no sales expense allotted to Panador, either in this respect or any other.

Q. Did you maintain the same office force in the [309] offices of Panaview as you did after you started manufacturing Panador as you did before?

A. Yes, sir.

Q. What is your opinion as to the increase in overhead which you would have encountered if you had had the opportunity of manufacturing 5,000 more Panadors in the period extending between November, 1955, and up to the present time?

The Court: November, 1955?

Mr. Mahoney: 1954 to the present time.

Mr. Duque: To which we object, your Honor, on the grounds that it is conjectural and speculative.

The Court: Where does the 5,000 figure come from?

Mr. Mahoney: The 5,000 figure is the stipulated figure of component parts for the doors which were shipped by Reynolds to Windsor.

The Court: You are asking the witness to as-

(Testimony of Louis Pinson.)

sume that, that plaintiff had manufactured those doors during the specified period stated, November, 1954, to date?

Mr. Mahoney: That is correct.

The Court: What is your question, his opinion as to what?

Mr. Mahoney: My question is directed to whether there would have been a substantial increase in overhead, in the opinion of the witness, if they had manufactured these additional doors. [310]

The Court: I don't know what you mean by "substantial."

Q. (By Mr. Mahoney): Would there have been an increase?

Mr. Duque: To which question I still object on the grounds that it is speculative. There is no evidence that they could have manufactured an additional 5,000 doors.

Mr. Mahoney: Mr. Pinson has previously testified that they had the facilities for the manufacture of such an additional number of doors.

Mr. Duque: I don't recollect any such testimony.

The Court: I don't recall it, either.

Could you have, during the period from 1954 to the present time, could the plaintiff have manufactured, or did the plaintiff have the facilities to manufacture 5,000 additional Panadors?

The Witness: Yes, your Honor.

The Court: Do you have an opinion as to what,

(Testimony of Louis Pinson.)

if any, increase in overhead would have been incurred——

The Witness: Yes.

The Court: ——if the plaintiff manufactured 5,000 Panadors during the period November, 1954, to date?

The Witness: I have an opinion.

The Court: What is that opinion?

The Witness: My opinion is that the increase in overhead would have been almost negligible.

The Court: Give us a percentage or an amount. [311]

The Witness: Less than two per cent, your Honor. I am talking there in terms only of additional electricity and minor items there.

The Court: Would you say one and one-half per cent, or one and three-fifths per cent?

The Witness: I would say in the neighborhood of two per cent.

The Court: There has to be a definite opinion.

The Witness: I have.

The Court: We can't compute something when you say "about."

The Witness: My opinion then is that two per cent would be aproximately our overhead.

The Court: Would that be it?

The Witness: Yes.

The Court: You see, you can't multiply approximately something by something, can you?

The Witness: Not very well, your Honor.

Mr. Mahoney: May we release Mr. Pinson, sub-

(Testimony of Louis Pinson.)

ject to recall to present in evidence the profit and loss statements which he has indicated can be obtained by him prior to the initiation of the afternoon session after the noon recess?

The Court: Do you wish to cross-examine him on his testimony up to now?

Mr. Duque: I probably will after he gets through. [312]

Mr. Mahoney: Do you wish to proceed now or wait until we produce those additional statements?

Mr. Duque: If he is going to put some more statements in, I would certainly like to have those to look at. In the first place, I understand that you are going to attempt to introduce the complete 1954 statement, to which I am going to object on the grounds it doesn't cover any issue in this case. Your costs, and everything else, could have gone up and down and all over the place during that period of time.

The Court: What do you deem to be the period. You just objected because the other period wasn't broad enough. What period do you wish covered?

Mr. Duque: From the end of 1954 through——

The Court: You mean as of December 31, 1954?

Mr. Duque: Yes.

The Court: Then the first six months of 1955 would cover it, wouldn't it?

Mr. Duque: Yes.

Q. (By Mr. Mahoney): Mr. Pinson, can you produce such a statement? A. Yes.

Q. Will you, upon leaving the stand, go to your

(Testimony of Louis Pinson.)

offices and obtain that statement? A. Yes.

Mr. Mahoney: Very well, you are released, subject to [313] recall.

The Court: Just a moment. Do you have any other rebuttal?

Mr. Mahoney: Yes, I do. I have Mr. Grossman in rebuttal to the testimony of Mr. Meyer.

The Court: Very well. Mr. Pinson, you may be excused, and return at 2:00 o'clock with the requested documents.

(Witness excused.)

The Court: You may recall Mr. Grossman in rebuttal.

ABRAHAM GROSSMAN

called as a witness by the plaintiff in rebuttal, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Mahoney:

Q. I show you Plaintiff's Exhibit No. 6 and Plaintiff's Exhibit No. 8; Plaintiff's Exhibit 6 being the original of your drawing presented by you to the Reynolds Metals Company, and Plaintiff's Exhibit 8 consisting of a sheaf of die prints submitted to you for your review by the Reynolds Metals Company.

Mr. Grossman, when you have previously testified that you placed on the drawing, Plaintiff's Exhibit

(Testimony of Abraham Grossman.)

No. 6, the dimensions which are shown thereupon, can you explain why you did not place upon that drawing the tolerances which are found in such exhibits included in Exhibit 8 as the 5X [314] drawing—is that correct? A. 4X.

Q. ——4X drawing.

A. The reason no tolerances were noted on my drawings is that all dimensions of a tolerance is given by the aluminum company as a commercial tolerance, and they are not noted on the drawings sent in for approval for the processing of a die, and so forth. But it is understood that if dies are ordered, or material through those dies is ordered with commercial tolerances that all of the dimensions, according to a certain formula for angles or solid dimensions of any particular dimension, all carry that commercial tolerance.

Now, unless there is a special notation, all of the commercial tolerances being equally divided between the plus and minus side, but if there is a special notice it means that the same commercial tolerances are unequally divided by the approval of the customer.

Now, is this, in your experience, the standard practice in the aluminum industry as a whole?

Mr. Duque: I object on the grounds that I thought we were not going into standard practices and customs in the aluminum industry.

Mr. Mahoney: The custom and usage which were stipulated as being removed from the issues in this case were, Mr. Duque, [315] custom and usage

(Testimony of Abraham Grossman.)

where the defendant's custom and usage defenses on the contract and the practice of the contract——

Mr. Duque: I was under the impression it was plaintiff that pleaded in his complaint the custom and usage and breach thereof.

The Court: This is an auxiliary issue that has risen, and not an issue raised in the pleadings at all.

Mr. Mahoney: This phase is not raised in the pleadings. It is true, as Mr. Duque states, that there was a pleading as to custom and usage in regard to the handling of confidential disclosures.

The Court: I would assume that in any production such as this, unless it is precision machine work, that there were tolerances. Is there any issue as to that?

Mr. Duque: I don't believe so, your Honor.

The Court: I suppose that in anything that the defendant manufactures the defendant insists that it be allowed certain tolerances in the production of it, unless, as I say, it is precision machine work.

Mr. Duque: I would imagine so, not being a tooling engineer.

Mr. Mahoney: Your Honor will then take judicial notice of the fact that in any extrusion process or any manufacturing process it is customary on the part of the designer of the product to allow to the supplier a certain freedom as regards [316] tolerances so that the product may be fit within its production schedule and production practice?

The Court: Unless there is some issue as to it.

(Testimony of Abraham Grossman.)

Mr. Duque: I would assume that to be correct, your Honor. I don't know if it is a matter of judicial notice or not.

The Court: Well, if it is a matter of common knowledge in the industry it is a matter of judicial notice, then the Court can have judicial knowledge. So I will leave it to you gentlemen to give me the judicial knowledge on the subject.

Mr. Mahoney: I have attempted to present by the testimony of Mr. Grossman the judicial knowledge that these tolerances are customarily applied to the parts after the original dimensions are submitted. Mr. Meyer testified that these tolerances had been applied by way of answer to whether anything had been added to the disclosures of the plaintiff here. And our purpose is to show that what was added was customary and not significant, and that the disclosures, as originally presented, were the heart of the matter.

Mr. Duque: Well, your Honor, whatever questions he wishes to ask Mr. Grossman, I am not going to interpose any objection. I will put Mr. Meyer on and we will get the thing straightened out as much as we can.

Q. (By Mr. Mahoney): Mr. Grossman, Mr. Meyer testified as to the redesign of the weatherstripping of the extrusion [317] which held the weatherstripping——

The Court: Before you leave this other subject, has this witness answered your question as to what was customary?

(Testimony of Abraham Grossman.)

Mr. Mahoney: Will you read back the question, please?

The Court: I suggest you rephrase it.

Q. (By Mr. Mahoney): Mr. Grossman, in your dealings with the suppliers of aluminum extrusions, when you submit a dimension drawing to the supplier, such as the drawing Plaintiff's Exhibit 6, is it not customary for the supplier to add to the figures of the drawing and the die prints returned to you for review, certain commercial tolerances which facilitate the manufacture of the part for your account?

A. It is when the commercial tolerance does not balance equally to the plus or minus side, there is no notation except possibly at the bottom of the sheet, but not on the drawing directly. But if there is a special commercial tolerance or the tolerance is still within the commercial limitations, but it is unequally divided between the plus and minus side, there is a special notation, with agreement to the customer, for that particular part to fit.

The Court: Were there any parts in this design you made for this door, which did not permit any tolerances in the function of it?

The Witness: No. [318]

Q. (By Mr. Mahoney): Mr. Grossman, Mr. Meyer has testified to the fact that there was a redesign of the extrusion which held the weatherstripping, and I believe that extrusion is shown in part No. 5X, and on drawing No. L-8439, which is incorporated in Plaintiff's Exhibit No. 8. Mr. Meyer

(Testimony of Abraham Grossman.)

also testified that it was upon his suggestion to you that the redesign of that extrusion took place. Is that true? A. No, it is not.

Q. Did you ever submit to Mr. Meyer with the first drawing of the extrusion any weatherstripping by which he could determine whether the weatherstripping would fit in the extrusion properly or not?

A. I did not.

Q. In your opinion could he have determined, without the weatherstripping, whether the extrusion would have functioned to retain the weatherstripping?

A. No. Our first drawing didn't indicate there would be weatherstripping in that particular receptacle. The thought was to have the part designed, the part produced from the die and weatherstripping constructed to fit the part afterwards.

Q. Can you explain how the change took place in part No. 5X?

A. Yes. The original 5X provided a receptacle for [319] weatherstripping that we were going to have made especially to fit that receptacle. And after talking with the weatherstripping people they assured us they could give us a better deal and a more economical deal by using one of their stock parts, which necessitated a different receptacle designed to receive that weatherstripping in that same part. So that the part that was redesigned was that particular portion that was used as a receptacle for that weatherstripping. And drawings of that part, in addition to the changed drawings that we went to

(Testimony of Abraham Grossman.)

receive that part, were sent to the Reynolds Metals Company for revision at that time.

Q. And did you submit this redesign to the Reynolds Metals Company solely upon your initiative? A. Yes.

Q. Now, Mr. Grossman, consulting the various cross-sectional part drawings in Plaintiff's Exhibit 6, and considering the dimensions thereof, to your knowledge is there any part shown there which, if manufactured to those dimensions without commercial tolerances but exactly as shown, would not fit one within the other as intended?

A. They would all fit if made as drawn.

Q. And, therefore, would you say in your opinion, and in accordance with your experience as to the practice of extruders, that the addition of commercial tolerances was solely to permit the manufacturer of extrusions to supply [320] extrusions which would fit together in—and allowing in die qualities and other manufacturing procedures?

Mr. Duque: I object to the question on the grounds that it is leading and suggestive, and unintelligible.

The Court: Sustained.

We will take the noon recess. You may reframe it.

We will recess until 2:00 o'clock.

(Whereupon, a recess was taken until 2:00 o'clock p.m. of the same day.) [321]

Wednesday, November 23, 1955—2:00 P.M.

The Court: Are there any ex parte matters?

The Clerk: No, your Honor.

The Court: You may proceed with the case on trial.

ABRAHAM GROSSMAN

a witness called by the plaintiff in rebuttal, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination
(Continued)

By Mr. Mahoney:

Q. Mr. Grossman, after you had presented the first drawing showing the extrusions with a receptacle for the weatherstripping to the Reynolds Metals Company, what took place?

A. Well, I received a call from Mr. Meyer stating that he would like to come over to see us to talk about it. And he did.

Q. And why did he say he had come?

A. Well, on the telephone, I don't recall the reason. But when he came, he said that there were certain simplifications that he thought could be accomplished; if the receptacle were to remain in the same position relative to its purpose in weatherstripping the track, that would simplify the die construction. And after looking over the drawings, I said that if the relative position of that weatherstripping [322] were still to take place, I would suggest several different methods by which the re-

(Testimony of Abraham Grossman.)

ceptacle could be simplified, and I, in order to save time, because that die was the last of the dies in view of that initial change to be made, I in freehand drew a number of possibilities that he could choose from, still maintaining the over-all purpose of the relationship of the weatherstripping to the track. And it was one of these suggestions that was presented to me finally in a redrawn form by Reynolds that I okayed for the final production of that die.

Q. Mr. Grossman, you testified this conference with Mr. Meyer took place after the first drawing. Did you——

A. Well, this was after the second drawing. Excuse me. The first drawing was Exhibit 6. Then another drawing was sent to Reynolds, and it was after the second drawing was sent that this conference took place.

Q. And with the modifications which you made in the second drawing did they—was the product manufactured in accordance therewith?

A. No. The final drawing was made according to the freehand revisions that I made for Mr. Meyer when he came to see us.

Q. You made these freehand sketches while Mr. Meyer was there?

A. Yes, right in the drafting room of our company. [323]

Q. Did he make any suggestions as to the form which the extrusions should take?

A. He might have had some discussion with me

(Testimony of Abraham Grossman.)

on my suggestions, but I don't recall that he made any that contributed to my final decision for the form.

Mr. Mahoney: That will be all. Your witness, Mr. Duque.

Cross-Examination

By Mr. Duque:

Q. Mr. Grossman, I understood your testimony before the luncheon recess to be that there was never any weatherstripping drawings submitted. Is that right?

A. Oh, I did not say that at all. I said the opposite, that there were weatherstripping drawings submitted.

Q. Submitted by whom to whom?

A. By me to Reynolds.

Q. Did you discuss this matter with your counsel after I had shown him all of the Reynolds' matters at the recess?

A. No, I did not. We went over this thoroughly even before the trial took place.

Mr. Duque: No further questions.

The Court: You may step down, Mr. Grossman.

(Witness excused.)

The Court: Any further rebuttal?

Mr. Mahoney: No rebuttal, your Honor. I would like at this time to put Mr. Pinson on the stand on the case in [324] chief.

The Court: You may.

LOUIS PINSON

called as a witness by the plaintiff, having been previously sworn, was recalled and testified further as follows:

Direct Examination

By Mr. Mahoney:

Q. I show you Plaintiff's Exhibit No. 27 for identification, and ask you what the title that the document bears is?

A. This is a financial statement.

The Court: Covering what period?

The Witness: Up to July 31st in the year 1955.

The Court: From January 1st through July 31st, is that correct?

The Witness: That is correct.

Q. (By Mr. Mahoney): By whom was this financial statement prepared?

A. That was prepared by David Belinkoff.

Q. And who is David Belinkoff?

A. They are our auditors and certified public accountants.

Mr. Mahoney: I now offer Plaintiff's Exhibit 27 for identification in evidence.

The Court: Is there any objection? [325]

Mr. Duque: No objection, your Honor.

The Court: It may be received in evidence.

(The exhibit referred to was marked Plaintiff's Exhibit 27 and received in evidence.)

Mr. Mahoney: Your witness, Mr. Duque.

(Testimony of Louis Pinson.)

Cross-Examination

By Mr. Duque:

Q. Is this last exhibit that you identified a certified audit or just an audit that is taken from the books of the Panaview company?

A. This audit is taken from the books. Our last certified audit was as of May 31st. So we have a two-month period since the last certified audit.

Q. The answer to my question then is that this is not a certified audit, is that right?

A. That is true.

Mr. Duque: Thank you. No further questions.

The Court: Any further questions of Mr. Pinson?

Mr. Mahoney: No further questions, your Honor.

The Court: You may step down.

(Witness excused.)

The Court: Does the plaintiff now rest?

Mr. Mahoney: Yes, your Honor.

The Court: Does the defendant rest?

Mr. Duque: Your Honor, I would like to call Mr. Meyer [326] in surrebuttal.

The Court: You may.

O. J. MEYER, JR.

called as a witness by the defendant in surrebuttal, having been previously sworn, was examined and testified as follows:

Mr. Duque: Will you please mark these for identification?

(The exhibits referred to were marked Defendant's Exhibits G, H, I, J and K for identification.)

Direct Examination

By Mr. Duque:

Q. I show you a drawing, Mr. Meyer, that has been marked Defendant's Exhibit G for identification. Will you tell us what that drawing is, please?

A. This is the print submitted by the customer Panaview for purposes of making the Reynolds section drawings.

Q. And is it identical to the one that you previously looked at here that was introduced by the plaintiff?

A. Yes. This is a print made from the plaintiff's tracing.

Q. Very well. I now hand you Defendant's Exhibit H for identification and ask you what that is?

A. This is a print which incorporates the change in the weatherstriping groove on Part 5X of the Panador.

Q. Who made that print? [327]

A. I do not know. The print was submitted by

(Testimony of O. J. Meyer, Jr.)

the customer Panaview. Who made the print, I don't know.

Q. But it was submitted to you after the original drawing? A. That's right.

Q. How long after? Do you remember?

A. We were still in the process of making the section drawings from customer's first print when a second change came through.

Q. I now show you Defendant's Exhibit I for identification. Will you tell us what that is, please, sir?

A. This is a print of the Schlagel weatherstrip which customer used in Part No. 5X as their weatherstripping section, and shows the detailing and dimensions and tolerances that the section is fabricated to.

Q. Now, will you tell us what transpired between the receipt by you of the second exhibit which you have just identified, and the last one?

A. The basic dimensions shown on the second print, which is H, showing the width of the weatherstripping groove as .437 and the depth as .070, with no tolerances shown, was incorporated in our original drawing, the die number not showing an A suffix. To the depth dimension .070 was added a special commercial tolerance, plus 12 minus nothing, to facilitate the weatherstripping section. [328]

Q. Now, I hand you Defendant's Exhibit J for identification, and ask you what that document is?

A. J is a print showing our A revision to Cus-

(Testimony of O. J. Meyer, Jr.)

tomer 5X, which shows a further revision of the weatherstripping groove.

Q. And by whom was that made?

A. This change was made as a result of having received this print showing the Schlagel weatherstripping, which shows a basic dimension of .437 and the width dimension of .070, plus or minus 5. And as we had originally made the drawings showing .070 inches, plus 12 minus nothing and the width dimension of .437, the weatherstripping was still not assembled with the section. It was at that point that I questioned the assembly of the weatherstripping with the extruded section, and with the result that section 5X was revised to our A revision, widening up the weatherstripping groove to facilitate the assembly of same.

The Court: The question was, who did it? Who prepared Exhibit J for identification?

The Witness: We prepared that in our office.

Q. (By Mr. Duque): I now hand you Defendant's Exhibit K for identification. Those are a series of drawings which are clipped together. Will you tell us what they are, please?

A. Exhibit K shows the final revisions performed on the sections for Panaview. All but Die 10418, customer [329] section 5X, were as the material shipped to Panaview. On customer 5X, a certain amount of material was shipped as against our die No. 10418-A. The revisions made in the weatherstripping group were still not sufficient to facilitate assembly due to the fact that the weatherstrip-

(Testimony of O. J. Meyer, Jr.)

ping is installed by hand and has a tendency to kink, and once this weatherstripping kinks it is almost impossible to remove same. The customer desired an easy assembly of the weatherstrip in the sections. The customer, in order to utilize the material on hand, to the best of my recollection, used a plastic base weatherstrip section which gave to the contour of the extrusion.

The customer utilized the sections on hand using the plastic weatherstrip. It was desired at that time to further revise the weatherstripping groove so as to facilitate a loose slip fit of the weatherstrip that should it drop through it would be possible to distort the shape of the weatherstrip so that it would be held in place within the extrusion. Because at that same time there was a question raised as to the binding effect of the two weatherstrip sections upon the top row, that when a door is moved in one direction the fibers of the weatherstrip had a tendency to trail, and when that direction was reversed, the fibers came together and would temporarily bind the section. So it was decided to correct both situations at the same time, [330] which would be to change the spacing of the weatherstrips relative to one another, and also to widen the weatherstripping groove to facilitate even a looser assembly. And those changes were incorporated in our die drawing 10418-B.

Q. When you say "it was decided," Mr. Meyer, what do you mean? Who was it decided by? You? Or Reynolds Metals engineering division?

(Testimony of O. J. Meyer, Jr.)

A. I made a call to the customer, discussing the situation with him, and explaining how the variation of our dimensional tolerances could affect this assembly, and it was out of that meeting that we recommended such dimensions be shown.

Q. Was the decision made by you to make those changes?

A. The suggestion was offered to the customer and his decision to go along with them.

Q. But you were the one who made the suggestions and conceived the changes that were made?

A. The final dimensions, yes.

Q. In connection with the special tolerances that were determined, who determined those special tolerances? Did you, at Reynolds Metals, or did Mr. Grossman?

A. In the discussion I supplied the tolerances from a tolerance chart and showed that they could be placed all on one side, without any additional pricing charge.

Q. And that was your idea? [331]

A. In this application, yes.

Q. And you submitted it to Mr. Grossman and after looking it over he agreed and approved it, is that correct?

A. The final dimensions and the tolerances, yes.

Mr. Duque: That is all.

Mr. Mahoney: No questions, your Honor.

Mr. Duque: May we offer in evidence the Exhibits G through K, your Honor, which have been identified by the witness?

(Testimony of O. J. Meyer, Jr.)

The Court: Is there an objection?

They may be received in evidence.

(The exhibits referred to, marked Defendant's Exhibits G, H, I, J, and K, were received in evidence.)

The Court: Mr. Meyer, whenever a customer submits you a drawing with fixed dimensions, do you always add to it some tolerances?

The Witness: No, sir. In some cases when sections are submitted to us showing just plain dimensions and there is no information relative to assembly fits, we operate on the basis that that is what the customer wants; and not knowing that there is an assembly, we process the prints on that basis, with the understanding that commercial tolerances are to apply, plus or minus so much.

The Court: Now, these tolerances you have been testifying about are over and above and in addition to the ordinary [332] commercial tolerances, are they?

The Witness: It is a rearrangement of the normal commercial tolerances, yes.

The Court: Are there certain normal commercial tolerances that are accepted in the trade?

The Witness: Yes, sir. The aluminum industry in the aluminum association have established certain tolerances which are considered standard.

The Court: And those are on a chart to which you have referred?

(Testimony of O. J. Meyer, Jr.)

The Witness: That's right.

The Court: Now, these tolerances that you supplied for the plaintiff's drawings, did they in every case exceed the tolerances, the normal commercial tolerances?

The Witness: They did not exceed in toto. They were the same in toto, if you would add plus or minus to——

The Court: Let's see if we mean the same thing. By "exceed," I mean exceed in the sense of being greater instead of being lesser.

The Witness: The total manufacturing allowance was actually the same, arranged in a different manner, to guarantee that the assemblies would fit together.

The Court: All applied to one side instead of two sides.

The Witness: That's right. [333]

The Court: In some cases.

The Witness: Operating in opposite directions on mating parts.

The Court: That is all I have. Anything further, gentlemen?

Mr. Duque: May I ask the witness one thing further, your Honor?

When you say you arranged them differently, what do you mean by that, Mr. Meyer? Or, what actually did you do?

The Witness: Well, the standard practice, understanding of the tolerances being on the plus or minus side and showing the same nominal dimen-

(Testimony of O. J. Meyer, Jr.)

sions on mating parts, if left in that manner with the understanding that the tolerances would vary plus or minus conceivably with the extrusions varying within those tolerances, they could bind and not possibly be assembled together. And that is the purpose in working from a starting point and moving in opposite directions, to guarantee that the assembly would be positive.

Mr. Duque: And in your opinion the rearrangement of those tolerances was the thing that made the door work, is that correct?

The Witness: They were necessary to guarantee the assembly of the respective parts.

Mr. Duque: That is all.

Mr. Mahoney: No questions, your Honor. [334]

The Court: You may step down, Mr. Meyer.

Mr. Duque: We have no further witnesses. We have no further evidence, your Honor.

The Court: Does the defendant rest?

Mr. Duque: Yes.

The Court: Both sides rest?

Mr. Mahoney: Yes, your Honor.

The Court: Do you wish to argue the matter?

Mr. Mahoney: Yes, your Honor.

The Court: Are you ready to proceed now?

Mr. Mahoney: Yes, your Honor.

The Court: You may proceed.

Mr. Mahoney: May it please the Court, the plaintiff here has urged three causes of action; one a cause of action for breach of an express contract; a second cause of action for a breach of confiden-

tial relationship; and a third for unfair competition.

The plaintiff's first cause of action rests upon the terms and conditions constituting a part of the acknowledgment which constitutes a part of the transaction entered into between the plaintiff and defendant when the dies from which customer part Nos. 1X to 9X were to be fabricated.

Referring to Plaintiff's Exhibit 21, we find the original of the acknowledgement which is to be found in the file of the defendant here. The acknowlegment consists of a [335] plurality of separate pages which have been stapled together and which bear in pencil handwriting the specific numbers of the individual dies which are identified and related with the specific parts which were to be manufactured from those dies to the order of the customer. Opposite each of the die numbers is a designation, in a column called "Price," of a substantial sum of money. For instance, opposite 2X is $150; and in the handwritten order there appears the statement "die charge."

Now, it has been stipulated here that the plaintiff has performed its contract by virtue of complete payment of the purchase order. And plaintiff relies here on the terms and conditions which appear as a part of this original acknowledgment, particularly paragraph 11 thereof which reads "Equipment." This paragraph specifies,

> "Any equipment (including jigs, printing plates or cylinders, dies and tools, etc.) which

Seller constructs or acquires specifically and solely for use on Buyer's order shall be and remain Seller's property and in Seller's sole possession and control. Any charges made by Seller therefor shall be for the use of such equipment only. When Seller has not accepted orders from Buyer for product to be made with such equipment for a period of one year, Seller may then require Buyer to give disposition [336] of the said equipment, and in the event such disposition is not given within thirty (30) days after such demand, Seller may without liability make such disposition as it sees fit or may store the equipment for the account of Buyer, charging Buyer for the storage charges."

Now, defendant here has filed a supplemental memorandum in which it states that in its opinion the pertinent portion of paragraph 11 of the terms and conditions of defendant's acknowledgment reads "as follows" and then there is quoted only the first sentence of the paragraph.

It is plaintiff's position here that the fundamental principles of contract law would dictate that the entire paragraph be read to ascertain whether the terms of paragraph 11 are applicable to the dies which are listed on the front of the acknowledgment and which were ordered on a basis of the terms and conditions appearing on the back of the acknowledgment.

Now, defendant evidently takes the position that

while paragraph 11 constitutes a part of the terms and conditions under which this transaction took place, and is applicable to the transaction, the word "any" and the words "specifically" and "solely" eliminate any consideration whatsoever of the fact that the dies were ordered specifically and solely for the use of the plaintiff and that a die charge was made [337] therefor.

Considering the position of the defendant in detail here, and looking at the facts of the actual transaction as it took place, it is apparent from the testimony of Mr. Grossman that he submitted the drawings Plaintiff's Exhibit 6-X to the defendant and that the acknowledgment was forthcoming in response thereto. If the dies which apear on the face of the acknowledgment were not manufactured solely for the use of the plaintiff, whom else were they manufactured for at the time that the transaction took place? There was no other party in the picture when this agreement and this acknowledgment was presented to the plaintiff here.

So far as "specifically" is concerned, it is obvious that the dies were intended specifically for the use of the plaintiff on its order for its parts 1-9-X; and at that time there was no other party in the transaction for whom the dies were to be manufactured or used.

The Court: I don't suppose there is any question about that, that the dies were made specifically for the plaintiff. The question is where is the provision that they were made solely for the plaintiff.

Mr. Mahoney: Well, your Honor, if they were

made specifically for the plaintiff in accordance with the language of the acknowledgment, certainly the language "solely" would also apply. [338]

If you are going to apply one word of paragraph 11 of the acknowledgment, certainly you cannot excerpt another word therefrom.

The Court: You mean "solely" and "specifically" are synonymous terms?

Mr. Mahoney: I mean that "solely" and "specifically" mean substantially the same thing.

The Court: Have you compared paragraph 12 of Exhibit 5, which was an older, older form of the Reynolds Metals Company apparently, which was sent to the Glide Company with this apparent later edition, paragraph 11 of Exhibit 2?

Mr. Mahoney: Yes, your Honor, we have read the terms of that.

The Court: You will notice there is a very significant sentence that is omitted there. I was just wondering what your explanation of that is.

Mr. Mahoney: Well, your Honor, in the first place it is the position of the plaintiff that the terms and acknowledgments constituting a part of the transaction in issue here stands on its own. But if consideration is to be given to the change in paragraph 12 in plaintiff's Exhibit 5, it can be shown that——

The Court: Isn't it one of the relevant surrounding circumstances?

Mr. Mahoney: Well, your Honor, the only relevance it [339] has here is that this was a change made in a clause of an acknowledgment which was

made without any explanation whatsoever to the plaintiff here.

The Court: I know, but the plaintiff has testified that they had a certain understanding that these dies were to be kept solely for their use, for plaintiff's use. Now, the inclusion of that sentence —perhaps you can give us that sentence so we can have it in the record.

Mr. Mahoney: Yes, your Honor. I will read it.

> "Any equipment (including jigs, printing plates or cylinders, dies and tools, but excluding patterns) which Seller constructs or acquires specifically for use on Buyer's order shall be and remain Seller's property and in Seller's sole possession and control, and any charges made by Seller therefor shall be for the use of such equipment only. All such equipment will be excused exclusively for the manufacture of products for Buyer * * *"

The Court: That is the sentence, that last sentence you read about the use of the equipment. The inclusion of that sentence in paragraph 12 of Exhibit 5 to the Glide Company might be an explanation, might it not, of the plaintiff's understanding here that the dies in question here were to be kept by Reynolds solely for plaintiff's use? [340]

Mr. Mahoney: It could be an explanation, your Honor, but it is contended that the language here is merely a revision of the language of paragraph 12 of the terms and conditions shown in Exhibit 5.

The Court: Do you find that sentence you have just read in paragraph 11 anywhere?

Mr. Mahoney: No, your Honor, I do not find it here. But the point we would make is that the word "solely" has been interposed.

The Court: After "specifically."

Mr. Mahoney: After "specifically." And the facts of the matter are these: Why, taking the logic of the situation, would the plaintiff pay a die charge amounting to $1430, said dies to be manufactured in conformity with the drawings submitted by the plaintiff if it was not going to obtain some sort of property right?

The Court: Well, that might be arguable as a business proposition; but as a legal proposition——

Mr. Mahoney: Well, as a legal proposition, your Honor, why is this provision on the back of the acknowledgment agreement if it doesn't have specific application to a situation where die charges are made?

The Court: Well, I wouldn't promote the lawyer who drafted that. I will say that much for him. But the first two sentences say that the die shall be the property of the [341] defendant. The last part of it says they will be stored for the account of the buyer under certain conditions. The defendant doesn't usually store his property for the account of the plaintiff, does he?

Mr. Mahoney: That's correct, your Honor.

The Court: Let's look at it this way: Is there any question but that the dies are the property, under the agreement, of the defendant?

Mr. Mahoney: There is no question, your Honor.

The Court: Then may not a person do anything he pleases with his property in the absence of a covenant not to do so?

Mr. Mahoney: Yes.

The Court: That is, anything otherwise lawful.

Mr. Mahoney: That is correct, your Honor.

The Court: Now, where is there a covenant here with this plaintiff?

Mr. Mahoney: The covenant consists of the statement that "Any equipment * * * which seller constructs or acquires specifically and solely for use on buyer's order shall be and remain seller's property and in seller's sole possession and control. Any charges made by seller therefor shall be for the use of such equipment only * * *"

Now, the charges made therefor were for the use of the dies.

Now, if "any charges" refers to the specific "any equipment," [342] then "any equipment" is equipment which is made specifically and solely for the use of the customer.

The Court: That is not necessarily so, is it? I assume that there might be dies made not specifically and solely for the use of the customer. Any that are are covered by that provision, aren't they?

Mr. Mahoney: Yes, your Honor. But if the defendant persists in misinterpretation of the agreement, and particularly this paragraph, they are on the horns of a dilemma because if these dies were not constructed specifically and solely for the account of the plaintiff and the exclusive use reserved

for the account of the plaintiff in accordance with the terms of paragraph 11, then there is no agreement in writing whatsoever relating to these dies. Plaintiff has made a die charge price therefor and plaintiff owns the dies because the defendant has not reserved any right, property right in the dies whatsoever.

The Court: Your position is, as I understand it, that if paragraph 11 applies it applies only to dies which are made specifically and solely for a customer.

Mr. Mahoney: That is correct, your Honor.

The Court: And if the defendant relies on paragraph 11, it must do so upon the premise that it made these dies solely and specifically, specifically and solely for the use of the plaintiff. [343]

Mr. Mahoney: That is correct, your Honor.

The Court: And the provision of paragraph 11, in other words, which gives the defendant the property right in the dies also gives it under the circumstances stated, namely, that the dies shall have been made specifically and solely for the use of the customer——

Mr. Mahoney: That is absolutely right, your Honor.

The Court: ——that unless the dies here were made specifically and solely for the use of the plaintiff they are not covered by those provisions of paragraph 11——

Mr. Mahoney: That is correct, your Honor.

The Court: ——that if they are not covered by the provisions of paragraph 11, the plaintiff, having

paid the die charge therefor, is the owner of the property and entitled to direct the use of it.

Mr. Mahoney: That is correct, your Honor.

The Court: I have your point.

Now, that is on the breach of contract.

Mr. Mahoney: Well, your Honor, there is one other point which I would like to refer to in relation to the contract, and that is the affidavit of Mr. Yates. Mr. Yates has testified that he is the regional general sales manager, Pacific Coast region, and that during the years he has worked with Reynolds Metals Company in its various departments and divisions—— [344]

The Court: Well, what does this have to do with it?

Mr. Mahoney: I am going to read you his statement in regard to the contract which appears in the affidavit at page 3, lines 20—between 26 and 27, and carrying over onto page 4.

He says:

> "By written agreement with Panaview, as is usual and customary in our dealings with customers for whom extruded shapes are made, the dies which we made were to remain the property of Reynolds Metals Company and under Reynolds Metals Company's sole possession and control, and Panaview simply acquired a priority on the use of the dies whenever its orders for extruded shapes were received by us. At no time did we agree by written contract, orally or otherwise, that the dies

which were made to produce extruded shapes for Panaview would be used exclusively or solely to produce extrusions for Panaview, as is erroneously alleged in Paragraph III of Plaintiff's Complaint, which I have read."

Now, your Honor, if Panaview acquired any rights of use, exclusive use, rights of use under this paragraph 11, it acquired exclusive use. The testimony of Mr. Yates in regard to the priority on the use of the dies is indicative of the fact that the defendant has conceded that under paragraph [345] 11 there is a right in the plaintiff to use of the dies, and to preferred use of the dies.

The Court: What do you say to the fact which appears here that the defendant had more than one set of these dies?

Mr. Mahoney: Your Honor, the sets of dies all bore the same die number as was previously allotted to the dies which were manufactured by the defendant for the account of Panaview. Now, if these dies were used indiscriminately, as Mr. Hairston testified, there would be absolutely no way in which the defendant could distinguish between the dies, and they constituted essentially fungible goods whose intermingling by the wrongful acts of the defendant must be ascribed solely to the defendant's door. It is up to the defendant to explain that one set of dies was or was not used on the products of a customer of Reynolds Metals Company.

The Court: Well, is there anything to prevent the defendant from making a dozen sets of them?

Mr. Mahoney: There certainly is, your Honor.

The Court: What is that?

Mr. Mahoney: The drawings were submitted, Plaintiff's Exhibit 6, in confidence to the defendant. And to make these drawings, or to make the dies, the defendant would have to rely on the fund of information contained in Plaintiff's Exhibit 6 in the fund of information which was derived from Plaintiff's Exhibit 6, which is Plaintiff's Exhibit 8. [346] Therefore, it would be a continual resort to the same source of information, which is Plaintiff's information, to manufacture these dies.

The Court: Is it your contention that if a person submits information to someone else in confidence that that person cannot use that information?

Mr. Mahoney: To the detriment and harm of the person who submits it to him in confidence.

The Court: Where is there any authority for that? It's a sound moral proposition.

Mr. Mahoney: I have several cases here which go to uphold that. In the Smith against Dravo case, the defendant negotiated with the plaintiff for the purchase of its business. The plaintiff submitted drawings to the defendant, submitted actual samples to the defendant, and actually submitted, also, little brochures which showed some of the detail of the construction, which happened to be a particular type of shipping bin. When the negotiations terminated there were at that time available to the defendant actual commercial models which were being used, but instead of going to the actual commercial

models which were in use, the defendant turned to that which had been given to it by the plaintiff and utilizing that fund of information which consisted in drawings and in exemplary embodiment of the devices went into competition with the plaintiff. And this action [347] was enjoined by the court as a breach of confidential relationship.

The Court: I have never heard of an action for a breach of confidential relationship, as such. I have heard of people standing in a fiduciary relationship to each other and in that relationship imposing certain duties—the law imposes certain duties.

Mr. Mahoney: Yes, your Honor. Well, we are saying here that there was a breach of trust and confidence.

The Court: There might have been. But there must be some property right violated, must there not?

Mr. Mahoney: There was a property right violated, your Honor; the intellectual property which was incorporated in the drawings of Plaintiff's Exhibit 6 were submitted to the defendant and from those drawings defendant, by a series of stages, manufactured the dies which were ultimately used to manufacture extrusions for the account of the defendant and transmit it to its parts department. The defendant by the use of the dies on its own behalf violated its position of trust with the plaintiff, and used the end product of that which was disclosed in confidence, namely, the dies, to the harm and detriment of the plaintiff.

The Court: Was there anything to prevent anyone from taking one of these doors and reversing the process, working back to the die? [348]

Mr. Mahoney: Your Honor, this is exactly on all fours with the situation in Smith against Dravo. The fact of the matter is that there is no testimony here whatsoever that the duplicates of the dies were made from any other drawings than from the drawings which came from the plaintiff. There has been no submission in evidence that there were separate drawings from which these duplicate dies were manufactured. So the defendant did not do it. And speculation as to whether it could have done it——

The Court: There is nothing to prevent it, so there is no property right in the end product. You say the property right is a literary property right arising from the drawings, being the creation of the plaintiff, the intellectual creation of the plaintiff. Is that it?

Mr. Mahoney: Here is one of the points in Smith against Dravo, your Honor: The fact that the defendant could have gained possession of his competitor's product through lawful means and then by inspection and analysis created a duplicate does not mean that he may, through a breach of confidence, gain the information in usable form and escape the efforts of inspection and analysis.

The Court: Well, your answer to my question then, I take it, is yes. Is that it?

Mr. Mahoney: Well, your Honor, will you please repeat your question? [349]

The Court: My question is that you don't rely on any property right in the product of the die?

Mr. Mahoney: Oh, no. The extrusions themselves.

The Court: You don't claim any right to prevent anyone from producing those extrusions?

Mr. Mahoney: The only one we claim a right against is Reynolds Metals Company at the present juncture.

The Court: Well, if Reynolds Metals Company went anywhere and bought a box of these parts and worked backwards to the drawing and made the dies from those, why, you wouldn't have anything to say, would you, under your theory?

Mr. Mahoney: Well, your Honor, as an extension of their contract, this is all linked together. There is an implied covenant of good faith, and I would think——

The Court: The implied covenant of good faith is not an implied covenant not to compete, is it?

Mr. Mahoney: But, your Honor, there is more than competition here. The plaintiff is a customer who has utilized the defendant as a supplier, and they do not stand on equal ground as would two individual competitors.

The Court: But the test is the contract, isn't it? It may be an abuse. A striking example of it is in the automobile industry. A man may have a dealership, and he invests hundreds of thousands of dollars in it, and the factory can cancel him out in 30 days under some such provision [350] under the

contract. They don't stand on equal footing, do they?

Mr. Mahoney: No, your Honor.

The Court: This man has spent thousands building himself up in the community as an ex-automobile dealer, and not only the electric signs but all the equipment in his shop is predicated on the assumption that he should continue as an ex-automobile dealer. But the factory can cancel him out, and has done so. It is a very hard and a very unequal dealing, but nonetheless legal.

Mr. Mahoney: I agree with your Honor on that state of the facts, but I don't think that it is on all fours with the conditions here.

The Court: Add something to it that makes this case different.

Mr. Mahoney: Well, your Honor, we have a contract which we contend says that the dies were made specifically, and your Honor has already stated that he does believe that the dies were made specifically for the plaintiff.

The Court: Well, I don't suppose there is any question about it that the plaintiff submitted the drawings and the drawings were made at the plaintiff's order.

Mr. Mahoney: So we come to the question of "solely." And the point we make here is that "solely and specifically" follow logically from the fact that a charge is made; that [351] the plaintiff would not pay a substantial die charge for dies which could then be used freely by the defendant for the account of any party for whom it chose to make the

dies, utilize the dies, including itself.

Now, your Honor, when we say that the dies were made solely and exclusively to manufacture other dies would constitute a mere subterfuge and evasion of the contract.

The Court: Well, what does that mean?

Mr. Mahoney: What that means is, your Honor, the contract would have no significance if the defendant here, to avoid its obligation under the contract, could merely utilize the parent dies and the parent drawings and make other dies to produce extrusions for its own account, or for the account of others than the plaintiff.

The Court: But suppose the defendant says, "We won't do that. We won't look at the drawings. We won't copy the dies."

Mr. Mahoney: But they didn't do it.

The Court: "These materials are out in the public domain. There is no patent on them, design or otherwise. There is no copyright. So we will just go at it backwards and go get the parts. We will go buy them."

Mr. Mahoney: But, your Honor, there is no evidence they did that.

The Court: I said suppose they had done it. Would [352] there be any action that this plaintiff could take?

Mr. Mahoney: Well, your Honor, if they went out and took the actual product and took the dimensions from the parts and then made die drawings it is our contention that it would still be a subterfuge. In other words, they would be going around

the contract in order to get in the back door; and doing in one way what they were estopped from doing in another way.

The Court: Well, let's assume now for the moment that the plaintiff has the sole and exclusive use of those particular dies.

Mr. Mahoney: Yes, your Honor.

The Court: Does the plaintiff have anything more than that? Does he have the right to prevent anyone from producing something exactly like it, so long as they don't use his drawings?

Mr. Mahoney: Well, your Honor, when you say "anyone," are you referring——

The Court: Anyone. I meant just that. Anyone.

Mr. Mahoney: I think we have the right to restrict the defendant here from doing that.

The Court: What is the basis of that right?

Mr. Mahoney: The basis of the right is that defendant has contracted that the dies upon which the die charges were made were for the exclusive use of the plaintiff. [353]

The Court: Yes. But the defendant says, "I haven't touched them. I can prove by 40 witnesses that these dies have never been used to produce anything but extrusions shipped to the plaintiff. Now, we have some other dies, however, just like them that we made ourselves."

Mr. Mahoney: Well, your Honor, to make those dies it would be inherent that they would have to resort to some form of drawing.

The Court: I don't know what they would have to do, but they have those same 40 witnesses to

prove that in making this second set of dies that they didn't even look at the drawings or the other dies. Now, what could you do about it?

Mr. Mahoney: Well, I would say in that case they probably would be outside of the breach of trust and confidence.

The Court: Breach of trust and confidence. There is no such action, is there?

Mr. Mahoney: No, your Honor.

The Court: That just makes the proof easier, doesn't it?

Mr. Mahoney: That's right.

The Court: If a breach of a fiduciary relationship exists——

Mr. Mahoney: Breach of a fiduciary relationship. [354]

The Court: ——the burden of fair dealing——

Mr. Mahoney: That's right.

The Court: ——shifts to the fiduciary.

Mr. Mahoney: That is correct, your Honor.

The Court: The burden of proof of fair dealing. But here, what you have, at the most, isn't it, is a literary property right; an intellectual property right, we will say? We won't call these drawings literary productions, but intellectual productions.

Mr. Mahoney: Yes.

The Court: You have a common law intellectual property right in the drawing——

Mr. Mahoney: Plus the contract.

The Court: ——which prevents you from using it, plus a contractual right to prevent anyone from using those particular dies——

Mr. Mahoney: That is correct, your Honor.

The Court: ——a particular set of dies which say the plaintiff bought and paid for.

Mr. Mahoney: Yes, your Honor.

The Court: So those are the two things you have. And if there is a breach of contract there's a breach of the contract in the use of those dies otherwise than as the defendant promised to use them. Is that not so?

Mr. Mahoney: Yes, your Honor. [355]

The Court: Now, is there any cause of action stated here for violation of any intellectual property right?

Mr. Mahoney: The first cause of action is the breach of contract. The second cause of action alleges the facts—it is entitled "breach of confidential relationship" and alleges the submission to the defendant of the blueprints.

The Court: Yes. But there is no violation of any confidential relationship, is there? What you claim here is a misappropriation by the defendant of the intellectual property rights of the plaintiff, isn't it?

Mr. Mahoney: That is correct, your Honor; they have breached its position of trust, its fiduciary relationship not to utilize that material which had been submitted to it for its own benefit to the detriment of the plaintiff.

The Court: Well, there was no such duty, was there? There was no duty not to use that information. There was a duty not to use it at all except for the plaintiff's consent. Isn't that your contention?

Mr. Mahoney: That is correct.

The Court: As far as the drawings are concerned?

Mr. Mahoney: That is correct.

The Court: Now, on this third cause of action where is there any unfair competition?

Mr. Mahoney: Well, your Honor, this being a diversity of citizenship case, and relying on Section 3369 of the [356] Civil Code of the Statement of California, wherein it is stated that:

> "As used in this Section, 'unfair competition' shall mean and include unfair or fraudulent business practice."

Now, in this case, your Honor, even the testimony of Mr. Gunderson, the defendant's witness, goes to prove that the defendant was negotiating with plaintiff's customers to supply the Windsor Manufacturing Company or the Windsor Supply Company with, as Mr. Sargeant stated in his affidavit, substantially all of the aluminum component parts of the aluminum frame sliding door.

The Court: But was there any obligation not to do that?

Mr. Mahoney: Well, your Honor, I think that this certainly constitutes a breach of the fiduciary relationship which the defendant had with the plaintiff arising out of its extension of the covenant of good faith implied in its contract with one hand——

The Court: Good faith to do what?

Mr. Mahoney: Not to utilize its position as a

supplier for the defendant—for the plaintiff, rather, to the detriment of the plaintiff.

The Court: Well, was there anything to prevent the defendant from coming down some Sunday morning and saying, "We won't supply you any more. Take your dies and go somewhere [357] else."

Mr. Mahoney: We would have been very happy if they had been that fair and square with us.

The Court: Yes. But it would have been a breach of good faith, wouldn't it, by the happening of something you certainly didn't expect to happen, and it put you to great disadvantage and caused you perhaps untold damage.

But is there anything to prevent, in law, is there anything to prevent the defendant from doing just that?

Mr. Mahoney: You mean returning the dies to us and cancelling us out?

The Court: Yes. On a moment's notice.

Mr. Mahoney: There wasn't, your Honor.

The Court: All right. You were in good faith relying on the defendant as a source of supply. There might not be another plant on the Pacific Coast or in the West that could duplicate what they were doing for you. It might have left you with unfilled orders. It might have caused you untold damage. But you wouldn't have a penny of recovery, would you?

Mr. Mahoney: Well, there was a purchase order which had already been acknowledged in this instance by the defendant, and a contract to supply

had been entered into between the plaintiff and defendant.

The Court: But you aren't suing here for the breach of [358] any contract to fill the purchase order.

Mr. Mahoney: Now, we are not, your Honor, but we are discussing the tragic state of affairs which you had propounded.

The Court: Well, I was propounding a hypothetical case. This talk about breach of bad faith and fiduciary relationships, it seems to me, doesn't add anything to the case. It just clouds the issue.

Mr. Mahoney: All right. Let's go a little further, your Honor. During the period in which they were supplying Windsor, and on cross-examination Mr. Hairston testified that so far as he knew a supply of one extrusion could be made to Windsor while the same extrusion would be lacking in the order which was delivered to Panaview.

The Court: Yes, if you were suing for a breach of a contract to deliver extrusions and you could prove that.

Mr. Mahoney: Well, your Honor, we have proved that the plaintiff, by the testimony of Mr. Pinson, was not receiving complete orders.

The Court: Yes. If you could prove that you could prove a wilful breach of the contract to supply extrusions. But you aren't suing on breach of contract.

Mr. Mahoney: That's right, your Honor. But what we intend to prove by that evidence is that by dealing as a competitor in supplying these sets

of extrusions to Windsor, [359] Reynolds was, to put it colloquially, cutting off the plaintiff's water at the source and to benefit itself with the profit which it could make in the operation of its parts department, was cutting out the plaintiff.

Now, certainly this constitutes a fraudulent position on the defendant's part.

The Court: Well, it's a very interesting point you make, but doesn't the public policy favoring free competition prevent the application of any such rule in the absence of a contract? We have all the time the situation where the customer teaches the supplier all the know-how of the trade, so to speak, and the supplier goes into business for himself. He likes the idea. He goes in competition with the customer. Is there anything to prevent it? Is that unfair competition? Morally, perhaps. Ethically, perhaps.

Mr. Mahoney: Not in a case where there are no other rights involved.

The Court: But here you don't assert any palming off of plaintiff's door—of defendant's product as the plaintiff's.

Mr. Mahoney: No, we do not, your Honor.

The Court: You don't claim any confusion in the public mind as to the source of this product?

Mr. Mahoney: No, your Honor.

The Court: Now, is there any California case—and [360] we are applying California law here—can you point to any California decision saying that it's unfair trade practice for a supplier to quit

supplying the person who gave him the idea and start supplying one of the competitors?

Mr. Mahoney: But that isn't what the defendant did here, your Honor. It didn't quit supplying us. It deceived the plaintiff with the idea that it was getting as much as the defendant could supply, whereas, as a matter of fact, the defendant was simultaneously supplying its own parts department so it could compete with the plaintiff; and was actually taking advantage of its position to place it in an unfair competitive position, not a reasonable, equal basis of competition, but by its position as source of supply was working behind the scenes, as it were, and supplying its own parts department while it was turning off the plaintiff's supply.

The Court: But is there any showing that the plaintiff lost a single sale on account of it?

Mr. Mahoney: Well, your Honor, it is shown that the plaintiff lost the sale of 5,000 doors to Windsor Supply Company.

The Court: But that is because the defendant was supplying the Windsor company at all, which you, as I understood, agreed that the defendant might legitimately do.

But is there any showing that any delay in supplying the plaintiff of these unbalanced orders you speak of, any [361] showing of any damage?

Mr. Mahoney: Yes, your Honor, in the letters that Mr. Pinson wrote he relayed to the defendant how this was holding up the sale and installation of the various—of the Panadors to various major

customers of the plaintiff. There certainly was a showing as to the manner in which——

The Court: But that would be a breach of the contract to supply, would it not?

Mr. Mahoney: But, your Honor, in the peculiar facts here takes on a different aspect.

The Court: Well, if you could prove that the defendant deliberately delayed deliveries and gave you without excuse, without legal excuse, gave you these unbalanced deliveries, you could certainly prove a breach of contract to deliver it, could you not?

Mr. Mahoney: Yes, your Honor.

The Court: And the damages would be the damages approximately resulting from such breach, would they not?

Mr. Mahoney: That's right, your Honor.

The Court: And you could show it was within the contemplation of the parties here that you couldn't assemble a door unless you had all the parts of the door.

Mr. Mahoney: That is correct.

The Court: But that isn't your case here.

Mr. Mahoney: No. We cite this as evidence of the manner [362] in which the manipulations of the defendant here aggravated the wrong that was done to the plaintiff by its initial acts of breach of contract and breach of its fiduciary relationship.

The Court: Well, yes, if you claimed a public confusion as to source. But I assume you can't do that because——

Mr. Mahoney: You couldn't do that because

Windsor would obviously know where their doors were coming from.

The Court: Well, you can't do it because the plaintiff was actually selling Windsor the same doors under Windsor's label, weren't they, and permitting Windsor to market under that label.

Mr. Mahoney: That is correct.

The Court: So any confusion as to source the plaintiff contributed to, didn't he?

Mr. Mahoney: Well, we are not contending that there was any.

The Court: There is no evidence of any.

Mr. Mahoney: Absolutely not.

The Court: Now, I am laying aside now the die question and the contract question and——

Mr. Mahoney: Yes.

The Court: ——the drawing question. Just because a supplier mistreats a customer—if that were unfair competition and damages could be recovered for it, we would certainly [363] be busy with them.

Mr. Mahoney: Well, this is not a classic case of secondary meaning and palming off. The plaintiff here would be the first to admit that, your Honor.

However, utilizing the language of the statute, while there have been decisions of the court restricted to the classic definition of unfair competition as involving secondary meaning and passing off, the statute itself merely says:

> "* * * including unfair and fraudulent business practices * * *"

and it is the contention of the plaintiff here that certainly by any standards the acts of the defend-

ant in impairing plaintiff's business operations by permitting itself to get into a position in which it was going to send out short orders to the plaintiff in order to benefit itself constitutes an unfair business practice. And we contend that it constituted a fraudulent business practice. Because they never told the plaintiff, or ever disclosed to the plaintiff that it was in competition with Reynolds Metals Company. They never made a fair disclosure of this. They let the plaintiff go on blind fighting this problem of shortages while the defendant in the meanwhile was placing itself in a position not to compete with the plaintiff but to out-compete the plaintiff by its position as source of control—as source of supply, rather. [364]

I admit, your Honor, that this is not the classic case. But by the language of the statute we contend that certainly this was unfair and fraudulent conduct, and an unfair and fraudulent business practice.

The facts here are somewhat unique. The whole relationship of the parties—as a matter of fact, while we have thoroughly researched the law we have been unable to find a case which is on all fours in every particular with this case.

The Court: That "unfair" means unfair to the public, doesn't it; by confusing the public as to the source; by leading the public to think it is buying A's goods when it is buying, in truth, B's goods.

Take the automobile agency case I cited. Suppose the factory was after this dealer constantly to increase his sales, or cut his profit, move these

cars, and so forth; at the same time they were negotiating down the street for a new dealer. It is very unfair. Nothing is said. But is that actionable unfair competition in a court of law? It's unfair to the dealer. It might be to the point where you would call it monstrous behavior. But is it illegal?

Mr. Mahoney: No, your Honor. But extending the analogy a little further, if the dealer blindly thought that he was the sole—that he was being supplied solely in an area by the automobile manufacturer, and the automobile manufacturer, in turn, and behind his back, was cutting off [365] his supply so that they could establish a dealership around the block of which he was not cognizant, I would then say that this would be actionable because they would be violating the spirit of the franchise which they had previously extended to him.

The Court: Well, what supply of the plaintiff here was cut off? What orders were unfilled?

Mr. Mahoney: We have pointed out that over a period extending from March through June orders——

The Court: Deliveries were slow, weren't they?

Mr. Mahoney: Incomplete. Not slow, your Honor. If we had gotten——

The Court: But were any of them left unfilled?

Mr. Mahoney: But, your Honor, time is of the essence in this industry. If you don't get a door into a house when it is erected, somebody else is going to come along and put the door in because the people aren't going to go and live in the house with a gaping hole in it.

The Court: Well, you are asking the court here, as I understand it, to infer from this evidence that this defendant deliberately shorted the delivery, so to speak, so as to hamper the plaintiff and give Windsor the advantage. Is that it?

Mr. Mahoney: To give the defendant advantage so it would be able to sell complete orders to Windsor Manufacturing [366] Company. Certainly, if it took extrusions which could have completed an order to the plaintiff and put them in the Windsor order, then this would have certainly harmed the plaintiff and benefited the defendant.

The Court: There is no question about it. If you were suing here for a breach of contract of delivery there would be no question about it. But we are speaking of actionable unfair competition.

Anything further?

Mr. Mahoney: That will be all, your Honor.

The Court: We will take the afternoon recess at this time of five minutes.

(Short recess.)

Mr. Duque: I covered most of the points that I would cover in this argument at this time. The point with regard to the contract, as I pointed out to your Honor yesterday, the distinction between Plaintiff's Exhibit 2 and Plaintiff's Exhibit 5, is quite clear and your Honor has indicated, at that time yesterday, that he had that point well in mind and has also indicated it today in the questioning of plaintiff's counsel. I will not belabor the subject unless there are any questions of points of law that

your Honor wishes me to argue on that phase of it.

The Court: Whoever revised that what was paragraph 12 in Exhibit 5 into paragraph 11 of Exhibit 2, when that [367] sentence was eliminated —may I have those exhibits, Mr. Clerk?

(Whereupon, the documents were handed to the court.)

The Court: Paragraph 12 of Exhibit 5 states:

> "Any equipment (including jigs, printing plates or cylinders, dies and tools, but excluding patterns) which Seller constructs or acquires specifically * * *"

That's the only adverb used there, "specifically"——

> "* * * for use on Buyer's order shall be and remain Seller's property and in Seller's sole possession and control, and any charges made by Seller therefor shall be for the use of such equipment only."

Then follows the sentence in the old form which was eliminated in the new one involved here, which reads:

> "All such equipment will be used exclusively for the manufacture of products for Buyer."

Now this is very clear.

Mr. Duque: Yes, your Honor.

The Court: Now, the reviser eliminated that sentence I last read and he says in paragraph 11 of Exhibit 2:

> "Any equipment * * * which Seller constructs or acquires specifically * * *"

and then he added: [368]

> "solely,"

and then goes on:

> "* * * for use on Buyer's order shall be and remain Seller's property * * *"

and so forth.

> "Any charges made by Seller therefor shall be for the use of such equipment only."

Now, plaintiff here makes the argument, as I understand it, that for this paragraph 11 to be applicable here the dies here must have been made specifically and solely for use on buyer's order. Those are the only kinds of dies that are mentioned in paragraph 11.

> "Any equipment * * * which Seller constructs or acquires specifically and solely for use on Buyer's order shall be and remain Seller's property * * *"

Mr. Duque: Your Honor, there is no question, and we do not evade the subject or argue it in any way, that the first set of dies originally made were made specifically to produce extrusions for Panaview. But there is a difference in the word "specifically" and in the word "solely."

The Court: Yes.

Mr. Duque: And there is no evidence in this

record, may it please your Honor, that we ever contracted to use these dies solely to produce extrusions for the plaintiff in [369] this case.

The Court: So the defendant says that these dies here are not dies which the seller instructed specifically and solely for use on buyer's order.

Mr. Duque: Yes, your Honor.

The Court: So the defendant says here, does he not, that these are not the kind of dies that are covered by paragraph 11, Exhibit 2, because they are not dies which are specifically and solely for the use in buyer's order.

Now, if that be defendant's contention, the plaintiff says, as I understand the argument, "Well, if paragraph 11 doesn't apply, then we bought the dies. They are ours and we may control the use of them.

Mr. Duque: Yes. But the evidence, your Honor, doesn't support that. The evidence shows that the plaintiff paid a service die use charge of $1,430 and that the cost of the dies was $3,176.

The Court: Where does that appear?

Mr. Duque: Where does what appear, your Honor?

The Court: Where do those facts appear? You see, I haven't had a chance to examine all of this documentary evidence.

Mr. Duque: I am sorry, your Honor.

The die cost is contained in the stipulation of facts.

The Court: Yes. [370]

Mr. Duque: And the figure of $3,176 is the cost

of the dies as testified to by Mr. Hairston, who is the comptroller who testified this morning.

The Court: Well, those original orders that came in——

Mr. Duque: The original orders, Mr. Hairston testified from those, your Honor.

The Court: What are the exhibit numbers? Exhibits 11 and 12?

Mr. Mahoney: Plaintiff's Exhibit 21, your Honor.

Mr. Duque: The entire Reynolds Metals file, Exhibit No. 21, yes, your Honor.

The Court. Yes. I haven't had an opportunity to examine that file.

Mr. Duque: If the court please, with regard to the interpretation of paragraph 11, paragraph 11 covers two situations, one where the dies are made solely for the use of the customer and another where it isn't solely for the use of the customer.

There are many cases where the customer pays the actual die charge, your Honor, and those dies are used solely for his use, such as in Government orders and——

The Court: Where is there any mention in paragraph 11 of Exhibit 2 of any other dies than those which are made solely and exclusively on the use of buyer's order?

Mr. Duque: It doesn't, your Honor. It simply says—— [371]

The Court: There isn't any mention of that, is there?

Mr. Duque: No, your Honor.

The Court: What governs the title and use and disposition of dies which are not made solely for the——

Mr. Duque: If they are made in a parts department—there are two different departments of this company, the parts department, which does milling work, and the general sales which does the rough extrusion work.

The Court: Where is there any written evidence comparable to paragraph 11 as to what shall happen to the dies that are not made solely for the exclusive use of the buyer?

Mr. Duque: The comparable one appears in the exhibit which is an order, a customer's order. That's a parts department order, your Honor.

The Court: That is paragraph 11 over again, isn't it?

Mr. Duque: No.

The Court: May I see that?

Mr. Duque: I don't believe so.

The Court: Now, the charge made was only $1,430. What do you say was the cost?

Mr. Duque: The cost was $3,170, your Honor. If the dies were not made solely for the use of the customer they would certainly remain the extruder's property, he having paid for them.

The Court: Well, the customer paid for them, didn't he? [372] He paid the die charge. Where are the invoices on that? May I see that Exhibit 21, Mr. Clerk?

(Whereupon, the document was handed to the court.)

Mr. Duque: He paid a die service charge, may it please your Honor, for the use of the dies, and we made extrusions for him and used those dies to make the extrusions. That's what he paid for and that is what he got.

The Court: Was that total of $1,430 billed as a die service charge?

Mr. Duque: Yes, sir.

The Court: All of it?

Mr. Duque: I am quite sure it was. I believe that is what the billing shows. It was billed as a die charge price. Those are the words that were used.

The Court: Was sales tax charged on it?

Mr. Duque: Your Honor, that I do not know. I don't believe that is in evidence, but I am sure that it wasn't.

Mr. Mahoney: No. There is a resale exemption statement, your Honor. You will note on the invoice, on the acknowledgment there is a statement below "exemption."

The Court: There is, but I don't know whether that is as to everything on the invoice or——

Mr. Mahoney: That is as to everything on the invoice, your Honor.

Mr. Duque: There was no sales tax paid, to answer your [373] Honor's question.

Here, your Honor, is the parts proposal that your Honor asked that I refer to.

The Court: What is the exhibit number?

Mr. Duque: Exhibit 15, sir.

The Court: Very well.

Mr. Duque: Then that is paragraph 10 in that exhibit. It says:

> "* * * and will be used exclusively for the manufacture of material for the purchaser * * *"

That is a situation where the entire die charge is paid by the purchaser at that time.

The Court: Well, that isn't involved here, is it? This plaintiff wasn't dealing with the parts division, was he?

Mr. Duque: He wasn't, your Honor. But that indicates the type of proposal that goes out from the parts division when a situation occurs, which your Honor says might have occurred here, where they paid for the whole part of the die, where they paid for the entire cost of the die, which they did not do in this case. But, in any event, as I argued yesterday, your Honor, and I again argue today, assuming that there is a contract for the sole and exclusive use of these dies. What is to prevent the defendant from making 10 other sets of identical dies and producing extrusions? What is to [374] prevent him from doing what happened in this case legally. What happened in this case, if the court please, was that the Windsor people and the Panaview people got into a fight and Panaview told Windsor if they didn't do so and so and pay their bills they weren't going to supply doors for them to supply Fuller. Windsor said, "We will take your door and we will break it down and have

it made, have the extrusions made by somebody, and produce the same door."

Now, assuming that there was a sole and exclusive contract, what is to prevent anybody from doing that very same thing with any of these doors that have been out on the market and out in the public domain?

The Court: The plaintiff says nothing, but the plaintiff says that plaintiff furnishes you a certain intellectual property, a creation of the plaintiff, certain drawings from which these dies are made and that if you made any duplicate sets of dies you made them from that drawing and that that is what you had no right to do, to misappropriate the intellectual property of the plaintiff.

Mr. Duque: I understand plaintiff's statement in that connection, your Honor, and there are three answers to it. In the first place, this is not a case to recover damages for a breach or misappropriation of an intellectual property.

The Court: Well, the second cause of action might be twisted into that, might it not? [375]

Mr. Duque: Well, I guess it could be twisted, but as I read it that isn't what it says.

The Court: That wasn't the way it started out, but in view of the rule as to judgments, Rule 54(c), which states:

> "Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even

if the party has not demanded such relief in his pleadings."

With that rule in mind, it might.

Mr. Duque: Yes, your Honor, it could very well. However, the facts don't substantiate that. The record here shows that this man had an idea of building a door and he put that door out on the market and he sold it and it was in the public domain. He was producing it, if the court please. This is no secret, unique, literary property right that nobody knows about.

The Court: But he says his drawings were; that the defendant would have had to have gone and reproduced the door or reproduced the dies in some other way; but he says the tort here was in misappropriating plaintiff's literary property by resorting to plaintiff's drawings to produce a duplicate set of dies.

Mr. Duque: If the court please, there is no evidence in the record that we misused his [376] drawings.

The Court: I assume that—well, the stipulation is that the defendant used plaintiff's die tools.

Mr. Duque: That plaintiff used the die tools to produce extrusions for Windsor. But we never misappropriated the drawings. We never disclosed them to anybody else. We never disclosed them to any of his competitors. This was a door, may it please your Honor, that was out on the market. It was brought by Windsor, as is stated in the affidavit of Mr. Sargeant and Mr. Hairston, to the defendant Reynolds Metals Company.

The Court: Your answer to that contention with respect to intellectual property is, as I understand it, that you did not misuse it or misappropriate the drawings; and by the stipulation of facts, you did use the dies.

Mr. Duque: Exactly, your Honor.

The Court: And you did not misuse the drawings. If you misused anything you misused the dies.

Mr. Duque: If we did anything wrong we used the dies to produce extrusions for Windsor. But if this is a wrong it is either a breach of contract or it is some other kind of a wrong. I can't put my finger on what kind of a wrong it would be, because it is done in the business whenever—well, we did not go into the custom and usage in the industry, so I will not argue that.

But my position, in answer to your Honor's question, is [377] that we did not misuse any of their property whatsoever at any time. We disclosed no drawings. We did nothing in the world that was in the least way illegal or immoral of any kind or character. We simply did what every extrusion company in the business does, your Honor. A customer came to us and said, "Here is a door. Will you break it down and make extrusions."

We said yes. So we broke it down and made the extrusions. We found we had a die that would make identical extrusions, so while we were building another set of dies we used that die. And that is what we have done. That is what the record shows.

And if that is a tort or a breach of contract, then we will have to live with it. Insofar as I am concerned, I don't see that there is any breach of the contract. I don't know of any tort that could follow.

The Court: It depends on what the contract was, and that is what I am trying to find. These invoices in Exhibit 21 merely say, as I read them, "die charge." It doesn't say anything more or less.

Mr. Duque: If there was no contract—in other words, if you follow plaintiff's argument, he says paragraph 11 doesn't apply, then there was no contract. If you follow his argument and——

The Court: At least paragraph 11 doesn't apply, but he says paragraph 11 retains the title in the seller, in [378] Reynolds, as to dies and jigs and so forth, produced specifically and solely for the use of the buyer.

Mr. Duque: Yes, your Honor.

The Court: But since you say the defendant here, Reynolds, says, "We didn't make these dies specifically and solely for Panaview's use," and 11 doesn't apply, and that there is no other provision that applies and therefore there must be no contract except a contract, an oral agreement that Reynolds would produce the dies for whatever the figure was, $1430. In the absence of anything else title passed to the plaintiff, the plaintiff has the title and therefore controls the use. That is plaintiff's argument, as I understand it.

Mr. Duque: If they will pay us the difference

between $1430, which they paid us, and $3167, they can have the dies.

The Court: I assume that their answer to that is that it is your business what you charged them, but they want the dies.

Now, where is there any evidence that the plaintiff did anything but buy the dies? The normal transaction would be a sale, wouldn't it?

Mr. Duque: Not when it says a "die charge." I don't think that is a sale. That's a charge, your Honor. A charge doesn't mean a sale, I don't think. I think that would be a somewhat strange construction of the word "charge."

The Court: It states "die charge"? [379]

Mr. Duque: Yes, sir. If it said purchase price of the dies or price of the dies or words to that effect, I could well understand it. But it is the plaintiff's burden, your Honor, to prove a contract, and we have proven by testimony that the charge was a use charge. We have live testimony to that effect—I mean on the witness stand and in the affidavits, testimony to the effect that it was a use charge and that it was not a sale. There is no testimony in the record to contradict that, your Honor. And that being the record, why would it be logical to say that this was a sale when it was simply a charge for the use of the dies, as has been testified to and has been uncontroverted.

The burden is on the plaintiff to prove a contract. They have alleged that paragraph 11 is the contract. If they do not want to rely on that, then they have to rely on some kind of an oral contract.

The Court: I think you both probably want to withdraw from that one, don't you?

Mr. Duque: Well, in any event, your Honor, the plaintiff must prove a contract in this case, and we submit that that has not been done. The alleged conversation in 1948 between Mr. Sargeant and Mr. Grossman, who was then working with Glide, certainly doesn't have any bearing on this action. So we submit, your Honor, that there is no contract for the exclusive use of the dies, whether you use paragraph [380] 11 or whether you do not.

We submit, further, that insofar as the second cause of action is concerned, the alleged breach of trust and confidence, that there has been no trust or there have been no confidences breached by anybody. These people were dealing at arm's length in a business transaction. There is no evidence here that fills the requirement of a breach of trust or a breach of fiduciary relationship. The record is completely silent on that. The only testimony there was in that connection, your Honor, was that Mr. Grossman or Mr. Kavich told—well, Mr. Grossman or Mr. Reznick told Mr. Kavich or Mr. Sargeant that they were coming out with a new door and, "Please don't let our competitors know we are coming out with a new door because it will affect our sales." That is the only evidence that has any bearing on alleged fiduciary relationship, and as I read the cases, your Honor, that doesn't create a fiduciary relationship. The relationship has to be established. It has to be assumed by the party to whom it is given. And we assumed no relationship, trust and

confidence with either Mr. Reznick or Mr. Grossman or with Glide or with Panaview or with Windsor. We were doing business with all of them.

Insofar as the unfair competition is concerned, your Honor, I don't want to belabor the point. The only thing that counsel has brought up in connection with that that is [381] new is that he claimed Section 3369 of the Civil Code makes unfair or fraudulent business practices unfair competition. But that Code section, quite obviously and by the cases, is interpreted for the benefit of the public, not for the individuals that are dealing.

The Court: What do you say to plaintiff's contention that the evidence shows the defendant gave plaintiff unbalanced deliveries and gave them while supplying Windsor with full deliveries?

Mr. Duque: Your Honor, I say two things to that: I say in the first place that this is not an action for breach of contract or for damages for incomplete or unfilled deliveries. There is no such action here. And in the second place their contention hasn't been proven by the evidence in this case. We admit, and Mr. Hairston testified, that there are times in the extrusion business, as in every business, when the delivery schedule falls down. Maybe your plant is only up to 60 per cent on its delivery schedule. But there is no evidence here that we failed to ever fill an order. There is no evidence here that there is any breach in that connection.

Assume that the deliveries were slow. Assume, for the purpose of argument, that there were periods

when the deliveries were slow. We have filled all the orders and there is no evidence here that we are remiss or delinquent [382] in having completed the defendant's orders. That is my answer to that contention of the plaintiff.

Insofar as the unfair competition is concerned, as I stated before, there is no unfair competition. The facts, in the first place, show that Reynolds Metals Company was never in competition with the plaintiff in this case. We did not produce assembled knocked-down doors with all the component parts at any time for anyone, so we were not in competition. In the first place there are none of the elements of unfair competition here, your Honor. There has been no palming off, no secondary meaning acquired as relates to Reynolds Metals Company, or even as relates to Windsor. So all of the elements that are necessary in unfair competition, as I read the law of the State of California, are lacking in this case.

I submit, your Honor, that plaintiff has failed to prove a case, has failed to prove a cause of action, either to prove a contract or a breach thereof or a fiduciary relationship or breach thereof, or unfair competition. And I submit that judgment should be rendered for the defendant and that the motion for preliminary injunction which was continued until the trial, after the hearing, should be denied.

Mr. Mahoney: Your Honor, the defendant here has made a point in both evidence and argument to the effect that [383] there is a disparity between the

charge which was made against the plaintiff for the dies and the alleged actual sums expended on the dies by the defendant. However, this is merely a case of adequacy of consideration and is not relevant here. If the terms of paragraph 11 do not apply it is immaterial what the defendant charged the plaintiff. If the defendant chose to charge the plaintiff 30 cents apiece for the dies that was defendant's prerogative.

The Court: Yes. But as I understand the defendant's point there it is that this is in issue here as to whether or not there was a sale or a mere charge for the use. And the defendant argues that relevant to that issue it is shown without dispute that the only charge made was less than half of the cost, and argues that there was no sale; and, assuming the rest of the argument, it is that the sale would have been more nearly the cost price if there had been a sale.

Mr. Mahoney: Well, your Honor, the defendant has assumed the position that the terms of paragraph 11 do not apply to the dies which were ordered here, and as your Honor very succinctly stated plaintiff's case in that regard, if there is no contract relating to the die charges made, then on the face of it, if the acknowledgments in paragraph 11 do not apply in their terms specifically and solely to these die charges and the dies which are set forth very clearly on the acknowledgment, then the dies are the property of the [384] plaintiff.

The Court: The defendant says, as I understand

it, that the testimony is to the effect that there was a contract for the use, and not a sale.

Mr. Mahoney: Well, your Honor, the testimony here—I am trying to recall the specific testimony which was made. The first point which can be made there is that it was never communicated to the plaintiff in any way whatsoever the fact that the die charge, the actual cost was $3170, or was in excess of the sum charged to the plaintiff. And there was never any mention, as the defendant has clearly pointed out, there was never any discussion, according to the defendant, as to the use of the dies in one way or another.

The plaintiff relies on paragraph 11. The defendant now says paragraph 11 doesn't apply. The plaintiff says, fine. The plaintiff says, "They are our dies. We paid the money. You have put in evidence nothing to show that there was any other contractual provision which you communicated to the plaintiff regarding the dies. You made a charge. We paid it." The only place where use is discussed is in the acknowledgment.

Now, your Honor, going further, and to show the fact——

The Court: What do you mean by the "acknowledgment"?

Mr. Mahoney: In the contract.

The Court: You mean the only place where use is discussed [385] is in paragraph 11?

Mr. Mahoney: In paragraph 11.

The Court: That is the contract you sue on?

Mr. Mahoney: Yes, we sued on it.

Now, your Honor, pointing to the supplement to the memorandum of points and authorities which was filed by the defendant here, the defendant stated, "Plaintiff must produce evidence of some other agreement for sole and exclusive use if it is to prevail in its contention that the dies were wrongfully used by defendant to produce extrusions for one of plaintiff's competitors."

And then it defines what it thinks the words "any" and "which" signify.

And then it goes on to say, "There are obviously situations in the production of aluminum extrusions, as the testimony in this case will show, where the extruding company does specifically agree to use the dies which it manufactures to produce extrusions for a given customer solely on that customer's order, such as extrusions which are being made for classified material for the Government, etc. * * *"

It is significant, your Honor, that no evidence in that regard was placed in the record, and that the defendant did not support the burden of proof which it set up for itself in its own supplement to its memorandum of points and authorities. [386]

Going further, your Honor, there has been produced here a document which contains the terms of the contract relating to the parts department. Now, it has been clearly pointed out in the evidence that the parts department and the extrusion division of Reynolds Metals Company operate as two separate and distinct entities. The introduction of what the contract of the parts department says has no relevance to the contractual situation as relates

to the extrusion department. As a matter of fact, there is no proof here that the parts department in any way makes any extrusion dies.

Now, your Honor, there has not been placed in evidence here in any way whatsoever any other form of alternative contractual agreement relating to sole and exclusive use of dies for which die charges have been made, and which have been made specifically and solely for the order of the customer, other than paragraph 11. And it is submitted that the defendant must choose the horn on which it will be impaled. It must either choose to go along with the plaintiff's contention that the language of paragraph 11 means a die for which a die charge was made and which was paid, or fall under the sole and exclusive use provisions of paragraph 11; or that if the defendant wants to maintain its position that there was no sole and specific manufacture, paragraph 11 has no relevance to the dies which are listed on the acknowledgment and that the dies—a die charge price— [387] that's another thing that should be pointed out to your Honor. While "die charge" is included on the acknowledgment, the column under which the money is set forth says, "Price."

Now, if there was no contract as to exclusive use and retention of ownership, then a price was paid; and whether there was a price which was identical or commensurate with that money which was expended on the manufacture of dies is irrelevant, it is well established in contract law that a contract can be made. One consideration which is disparate

in value with another can be exchanged between the parties.

There does not appear anywhere in the acknowledgment and the orders the term "die service charge." The term "service charge" is a phrase which is used by other extruders in the field.

Now, the defendant here has conceded the use of the plaintiff's dies, but it points out that Mr. Hairston has testified that there were duplicate sets of dies. Now, as your Honor may or may not know, it is customary in the trade to manufacture duplicate sets of dies for various purposes.

The Court: In view of the stipulation of facts that the dies made for the plaintiff were used in the preparation of a duplicate set, it is immaterial, isn't it?

Mr. Mahoney: That is the way we feel exactly, your Honor. But since this was brought up in argument we felt [388] it should be answered.

Anyway, there is no evidence when the duplicate set was made. There is no evidence when its use was initiated. And there is no evidence as to whether any attempt was made to restrict the use of the duplicate set to Reynolds production for its own parts department and to restrict the use of the Panaview dies solely for Panaview doors. It is our contention that, as your Honor has succinctly stated, in view of the stipulation this is not material here.

Now, counsel for the defendant has repeatedly stated that there is no evidence here that any of the employees, agents or officers of the Reynolds Metals Company disclosed the contents of the drawings

which were submitted, Plaintiff's Exhibit No. 6, to the defendant. But this is not the gist of the plaintiff's complaint. What the gist of plaintiff's complaint is is that the defendant misused the drawings by taking the drawings as the parent and the dies as the child and misusing the dies by producing for its own account, for its parts division, the extrusions for utilization by the parts division. We don't contend, and we have not—it is conceded—placed any evidence in the record that either Mr. Sargeant or Mr. Kavich went around and told anybody else about the details of the drawings which were disclosed. This is a question of internal misuse and internal misappropriation. [389]

Now, there has been some discussion on the question of fiduciary relationship here; the statement being made that there was no expressed agreement by the defendant that it would keep any drawings submitted to it by the plaintiff in confidence. However, there were decisions of the Court which hold that there need not be an express statement that there is an intent to establish a fiduciary relationship and that such a fiduciary relationship may be implied from the facts and circumstances of the transactions.

Here the plaintiff took its drawings to the defendant. The defendant took the drawings from the plaintiff and made dies therefrom to its profit and benefit because it was able then to sell what has been established to be huge numbers of extrusions, and huge volumes so far as price is concerned. The figures which have been placed in evidence show that

alone the defendant has sold approximately $150,000 worth of materials through its parts department to Windsor Supply Company, which is indicative of the tremendous inducement available to the defendant to violate its contract and to breach his fiduciary obligation.

Now, so far as the contentions of plaintiff regarding Reynolds' manufacture of extrusions for Windsor Supply are concerned, plaintiff wishes to point out that it was Reynolds' action in going behind the back of the plaintiff in negotiating with the officers of Windsor Supply Company that [390] enabled Windsor Supply to break its relationship with the plaintiff and to immediately set up in business. If the practice which your Honor has previously adverted to were followed wherein the door was bona fidely brought in, wherein the extrusions were taken apart, measured, dies made therefrom, your Honor has previously taken judicial notice that this would take a long period of time because of the natural difficulties of the situation.

And it has been pointed by Mr. Meyer, the defendant's own witness, even where the very party who created the idea came into Reynolds Metals, who were experts on the extrusion of materials, there was a certain amount of running back and forth to determine what the tolerances would be and what would be done. All of these things would be magnified tremendously in scope if Reynolds had actually taken the door and followed the procedures which your Honor has suggested as alternative modes of procedure.

It is submitted therefore, your Honor, that the plaintiff has made its case for the breach of contract by the defendant in using the dies of the plaintiff, when it has already conceded such use; that it has breached its fiduciary obligation by using the product resulting from its confidential disclosure of drawings to the defendant; and that it has unfairly and fraudulently dealt with the plaintiff by deliberately and with malice aforethought establishing itself as [391] a supplier to a competitor who was in direct competition with the plaintiff.

The Court: Is there anything further? If not, it will stand submitted, gentlemen, both the motion and the case after trial.

The Clerk: Your Honor, Plaintiff's Exhibits 9-A, B, C and D for identification were to be returned at the conclusion of the trial.

The Court: Those are Mr. Oldenkamp's files, Exhibits 9-A, B, C and D for identification.

Mr. Duque: I beg your pardon?

The Court: Mr. Mahoney, Exhibits 9-A, B, C and D for identification are files of Mr. Oldenkamp.

Mr. Mahoney: We have contracted with Mr. Oldenkamp, that is plaintiff's attorneys, to see that they are returned to him, and if they will be released to the custody of plaintiff's attorneys they will see that he gets them back.

The Court: Very well. The clerk will release them to your custody.

Mr. Mahoney: Thank you.

The Court: Anything further, Mr. Clerk?

The Clerk: That is all, your Honor.

The Court: Very well. The case will stand submitted.

(Whereupon, the above-entitled matter was concluded.) [392]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 2nd day of March, 1956.

/s/ DON P. CRAM,
Official Reporter.

[Endorsed]: Filed March 5, 1956.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 73, inclusive, contain the original

Compliant;

Answer;

Affidavit of Frank K. Miles (Exhibit A);

Affidavit of Harry M. Sargeant (Exhibit C);

Affidavit of William O. Yates (Exhibit E);

Affidavit of James M. Hairston (Exhibit B);

Affidavit of O. J. Meyer, Jr. (Exhibit D);

Stipulation of Facts (Exhibit 1);

Plaintiff's Objections to Defendant's Proposed Findings of Fact;

Findings of Fact and Conclusions of Law;

Judgment for Defendant and Order Denying Injunctive Relief;

Notice of Appeal;

Designation of Record for Appeal;

Points on Appeal;

Designation of Additional Parts of Record on Appeal;

Affidavit for Order Under Rule 73(g) Extending Time;

which together with the original Defendant's Exhibits A through K, inclusive; Plaintiff's Exhibits 1, 2, 5, 6, 11, 12, 13, 14, 21, 24, 25, 26 and 27; and 4 volumes of reporter's transcript; in the above-entitled cause constitute that transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said cause.

I further certify that my fees for preparing the foregoing record amount to $2.00, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 8th day of March, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15059. United States Court of Appeals for the Ninth Circuit. Panaview Door & Window Co., a Corporation, Appellant, vs. Reynolds Metals Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed March 9, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals,
Ninth Circuit

No. 15059

PANAVIEW DOOR & WINDOW CO.,
Plaintiff and Appellant,

vs.

REYNOLDS METALS COMPANY,
Defendant and Appellee.

NOTICE UNDER RULE 17(6) OF THE NINTH CIRCUIT COURT OF APPEALS

To the Clerk, Honorable Paul P. O'Brien:

Appellant hereby presents the following concise statement of points on appeal and its designation of the parts of the record material to this appeal, pursuant to subdivision 6 of Rule 17 of the rules of this Court, to wit:

Points on Appeal

1. The trial court should have sustained each and every objection filed by plaintiff to the proposed findings of fact.

2. The findings are not supported by the evidence and are erroneous as a matter of law in that they find that the dies in question were not made solely for plaintiff's use under the contract.

3. The trial court violated the rule that any uncertainty in the contract should be construed against defendant who drafted the contract.

4. The findings were contrary to the judicial admissions of defendant that the dies were governed by paragraph 11 of the contract.

5. The trial court erred in its holding that plaintiff failed to establish by a preponderance of the evidence that defendant had breached its relationship of trust and confidence with the plaintiff by utilizing the work product of plaintiff disclosed to defendant in confidence to manufacture dies on plaintiff's order and by subsequently utilizing said dies for its own profit and benefit to the injury and harm of plaintiff, since no evidence to the contrary was placed in the record by the defendant.

6. The trial court erred in its holding that plaintiff had failed to establish by a preponderance of the evidence that defendant unfairly competed with plaintiff by offering to sell and selling to customers of plaintiff products manufactured by the use of information disclosed to defendant by plaintiff in trust and confidence, since no evidence to the contrary was placed in the record by the defendant.

Dated this 14th day of March, 1956.

THOMAS P. MAHONEY and
MACBETH & FORD,

By /s/ PATRICK H. FORD,
Attorneys for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed March 16, 1956.

No. 15059

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PANAVIEW DOOR & WINDOW CO., a corporation,

Appellant,

vs.

REYNOLDS METALS COMPANY, a corporation,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division. Hon. Wm. C. Mathes, Judge.

BRIEF FOR APPELLANT.

MACBETH & FORD,
THOMAS P. MAHONEY,
PATRICK H. FORD,
1709 West Eighth Street,
Los Angeles 17, California,
Attorneys for Appellant.

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No. 15059

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PANAVIEW DOOR & WINDOW CO., a corporation,

Appellant,

vs.

REYNOLDS METALS COMPANY, a corporation,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division. Hon. Wm. C. Mathes, Judge.

BRIEF FOR APPELLANT.

Introduction.

This is an appeal from the final judgment denying the plaintiff any relief sought in the complaint. The suit was brought for breach of contract, breach of confidential relationship and unfair competition.

Jurisdictional Statement.

Jurisdiction of this suit in the District Court is conferred by 28 U. S. C., Section 1332 (62 Stat. 930, Act of Jan. 25, 1948) based on diversity of citizenship and the jurisdictional amount [Complaint, Par. I, II, R. 3-4; Ans., R. 9; Findings, R. 57].

A final judgment for defendant was entered December 20, 1955 [R. 63-64]. Timely objections to the proposed findings were filed December 15, 1955 [R. 41-56].

Plaintiff's notice of appeal was filed January 12, 1956, within the statutory period [R. 65]. Jurisdiction of this court is conferred under 28 U. S. C., Section 1291 (65 Stat. 726, Act of Oct. 31, 1951).

Statement of the Case.

Mr. Grossman, the President of appellant, submitted the drawing, Exhibit 6, to the appellee through Mr. Kavich, a salesman for appellee, and at the time told him that the information submitted should be held in strict confidence [R. 94-95, 117-118, 120-121]. The appellee did not put Mr. Kavich on the stand in an attempt to controvert Mr. Grossman's testimony regarding the original submission of the drawing, Exhibit 6, to the appellee. An entry of "Patents Pending" appeared on each drawing [R. 457-458].

Appellee admitted, through its counsel, that the drawing, Exhibit 6, appeared to be the creation of Mr. Grossman [R. 96] and at no time did appellee establish that there was any publication to any one other than appellee of the drawing submitted in confidence to appellee.

After the submission of the drawing, appellee made extrusion drawings, Exhibits 8, H, J and K based on Exhibit 6 and delivered them to appellant for review [R. 10, 127, 148, 319, 392-397, 461-469].

Subsequently, customer orders were placed with appellee by appellant in the period from April 20, 1954 through February 23, 1955, the first shipments being made on October 5, 1954 and the last shipments being made on May 31, 1955 [Ex. 1, Stipulation, R. 39-40].

The contract was entered into on a printed form, drafted entirely by the appellee, the appellee agreeing to manufacture for appellant certain aluminum extrusions. This contract listed nine specific dies and listed a "Die Charge" for each die. The words "die charge" were typed or dittoed onto the printed form. The amount of each "die charge" was listed in a column bearing the printed designation, "Price" [Ex. 21, R. 254-255]. The total of the die charges was $1430.00 [Stip. Ex. 1, R. 40] which was paid by appellant [R. 263]. Other pertinent parts of the printed form [Ex. 2, R. 91-92] read as follows:

> "We [Reynolds Metals Company] acknowledge the receipt of your order and the above is an exact copy of our entry thereof. If there are any objections to the above, please notify us AT ONCE. If we do not receive such notice, it will be understood that you accept the basis on which we have entered your order and that fulfillment of the order will be undertaken and deliveries will be made under the terms and conditions of the contract evidenced by this acknowledgement. * * *
>
> "Terms and Conditions
>
> "1. CONTRACT BETWEEN BUYER AND SELLER: This acknowledgement shall constitute the entire contract between Buyer and Seller with respect to the subject matter thereof, and said contract shall not be amended, modified or rescinded except by written agreement signed by an authorized official of each party, expressly referring to this contract. * * *
>
> "11. EQUIPMENT: Any equipment (including jigs, printing plates or cylinders, dies and tools, etc.) which Seller constructs or acquires specifically and solely for use on Buyer's order shall be and remain Seller's property and in Seller's sole possession and

control. Any charges made by Seller therefor shall be for the use of such equipment only. When Seller has not accepted orders from Buyer for product to be made with such equipment for a period of one year, Seller may then require Buyer to give disposition of the said equipment, and in the event such disposition is not given within thirty (30) days after such demand, Seller may without liability make such disposition as it sees fit or may store the equipment for the account of Buyer, charging Buyer for the storage charges * * *"

Using the appellant's drawings [Ex. 6; R. 392-399, 457], the appellee then made nine dies which were used on appellant's first and subsequent orders [R. 40-41]. Appellant had orders in effect with appellee for material requiring use of such dies at all times from April 20, 1954, to May 31, 1955 [R. 39-40], when the appellee made the last shipment to appellant [Ex. 21, R. 254; Ex. 1, R. 39-40, 336-337].

In September, 1954, without appellant's knowledge or consent, appellee accepted orders from Windsor Supply Company, appellant's chief customer, for certain processed extrusions, and appellee used the same dies to make such extrusions which it had manufactured specifically to fulfill appellant's first order of April, 1954 [R. 170, 182, 185].

In February, 1955, appellant learned that appellee was supplying extrusions to Windsor Manufacturing Company, a customer of appellants [R. 134]. The purchase orders directed from Windsor Manufacturing Company to appellee described the products supplied by appellee to Windsor Manufacturing Company as so many sets of KD Sliding Doors, which meant "Knocked-down" [Exs. 11-12; R. 171-172, 188-192]. Windsor Manu-

facturing Company was a direct customer of appellant until December, 1954 [R. 232, 237-238, 245].

The record shows that appellee knew that it was supplying extrusions for knocked-down sliding doors from dies manufactured in accordance with appellant's drawing [R. 32]. The Court took judicial notice of the fact that appellee was supplying essential components of the sliding door, without which the door could not be placed in a carton and shipped to a customer [R. 183], and it was stipulated that appellee shipped to Windsor Manufacturing Company component parts for five thousand (5,000) doors manufactured from the dies made by appellee to appellant's designs, as submitted originally by appellant to appellee in Exhibit 6 [R. 180].

During the period from January through May, 1955, appellee was selling parts made in accordance with appellant's drawing, Exhibit 6, to Windsor Manufacturing Company to the exclusion of appellant, and was, at the same time, sending incomplete and unbalanced shipments to appellant so that appellant could not complete its own sliding doors from parts being shipped to it [R. 259, 274]. Thus, appellant was being deprived of shipments to which it was entitled while appellee was profiting by its breach of trust and confidence in selling and shipping orders of extrusions and parts to Windsor Manufacturing Company. Moreover, the internal records of appellee showed that the orders were for component parts of sliding doors which bore the notation: "sliding doors, these are component parts so be sure and ship all sections at same time" [R. 255].

Thus, appellee aggravated the wrong of breach of trust by entering into competition with the appellant in the sale

of extrusions of appellant's design to the Windsor Manufacturing Company.

It was established, and not controverted by appellee, that late in 1954, when appellant was attempting to obtain back payments from the Windsor Manufacturing Company, Mr. McLin, an officer of Windsor, stated that he had another source of sliding doors [R. 232-238]. It is apparent from the record that the source was appellee. It should also be pointed out that during the period when appellant was being shipped incomplete and unbalanced orders, letters were written to appellee protesting such shipments [R. 300-301].

During the period when appellee was supplying Windsor Manufacturing Company, appellant was capable of producing fifteen hundred (1500) sliding doors per month without increasing its tooling or labor force [R. 273]. Actual production was only about seven hundred (700) sliding doors per month [R. 272-273]. Therefore, appellant could easily have produced the five thousand (5,000) doors which it was stipulated appellee sold to Windsor Manufacturing Company.

It was stipulated by appellee that parts were shipped by appellee to Windsor Manufacturing Company sufficient to make approximately five thousand (5,000) doors [R. 180] and that the total purchases by Windsor Manufacturing Company from appellee aggregated a dollar value of $155,624.97, subject to check.

During this period, appellant's testimony established that the average cost per door manufactured by it was $28.67, Exhibit 24 [R. 334], and that the average sales price was $65.00, netting a profit of $36.33 per door to appellant [R. 336]. Thus, the actual damage done to

appellant by appellee's breach of contract, breach of trust and confidence and unfair competition was in excess of $150,000.00.

During the course of the proceedings in this case, prior to the trial, the defense shifted its ground several times, and their divergent positions are significant facts bearing on the good faith of their position and ultimate defense. A chronological analysis follows:

Sept. 2, 1955. Answer filed, verified, denied use of the dies [Par. X of Complaint alleged use of dies and was denied by Par. II of Ans. R. 10].

Sept. 14. Sargeant affidavit, that preliminary injunction would cause *irreparable injury* to appellee because extrusions of similar size and shape were being sold to "many other companies and industries" *but not admitting use of the dies made specifically for appellant* [R. 21].

Sept. 15. Hairston affidavit, that in processing the Windsor purchase order

> "it was determined that the sections called for were the same as the sections produced for Panaview * * * [and] our existing die tools * * * which were previously used by us for Panaview * * * *were* * * * *used by us to produce the extrusions called for by the Windsor order.*" [R. 32, italics supplied.]

Nov. 17. Stipulation:

> "defendant used the existing die tools * * * which had been previously used * * * for plaintiff * * * to produce the extrusions called for by the orders thereafter received from Windsor * * * [R. 40-41].

Thus, the story switched from a sworn denial of using the dies, to a claim of irreparable injury if enjoined from using them, to an admission of use—all in a period of thirteen days.

An even more remarkable shift of position occurred in regard to the meaning and applicability of Paragraph 11 of the Printed Form. This evidence on this shift is discussed in detail under Point II of the Argument in this brief.

Specification of Errors.

The Points on Appeal, as designated by appellant, appear on pages 455 and 456 of the Printed Record.

The errors may be summarized as follows:

1. As a matter of law, the Court below erred in not construing the contractual provision relating to equipment made "specifically and solely" for appellant's order, and providing for a "die charge" for such equipment, to be applicable to the dies actually made and for which "die charges" were provided in the contract itself.

2. The Court erred in holding that appellant had the burden of proving by a preponderance of the evidence that the contract provisions, if ambiguous, were applicable to the dies described in the contract.

3. The Court erred as a matter of law in holding that appellee had not breached trust and confidence, as to the drawings, submitted by appellant, and was not guilty of unfair competition in using said drawings and the information therein for its own account and profit in direct competition with appellant, inasmuch as all the evidence pointed, without conflict, to said breach and unfair competition.

Summary of Argument.

On the contract count, appellant's argument is two-fold:

1. The printed term and condition in Paragraph 11 on the reverse of a form contract, being the only term or condition which refers to any charges for dies, and being applicable only to equipment or dies made "specifically and solely" for the order contained on the front side of the document, necessarily, and without ambiguity, is applicable to dies described on the front side and for which appellee made "die charges", specifically listed as such.

2. If, however, the Court sees any ambiguity in the document, drafted entirely by appellee, the doubt must be resolved in favor of appellant, especially since all the evidence introduced indicated that both parties regarded the printed "term and condition" as applicable.

On the other two counts, involving breach of confidential relations and unfair competition, the argument is five-fold:

1. A property right existed in appellant because of its creation of original designs for sliding doors submitted in confidence to appellee.

2. Confidential relationship may be implied from the acts of the parties and no express agreement need be made.

3. The public sale of articles made in accordance with confidential drawings did not destroy the confidential relationship between the parties as to the confidential drawings.

4. The essence of the wrong done by appellee lay in its breach of trust and misuse of confidential information submitted to it by appellant for its own profit.

5. Appellee unfairly competed by using confidential information to alienate appellant's customer and to engage in the sale of aluminum sliding door parts of appellant's design in competition with appellant.

ARGUMENT.

I.

The Printed Paragraph Providing for a Die Charge for Dies Constructed Specifically and Solely for Appellant Clearly Applied to the Die Charges Listed Elsewhere in the Contract.

The phrase "die charge" was used nine times in the contract [R. 254-255]. On the face of the appellee's "Acknowledgment Form", nine "die charges" were listed [R. 40, Par. 3]. On the reverse side of the "Acknowledgment Form", were certain "Terms & Conditions", which the front side incorporated by reference:

> "We acknowledge the receipt of your order. If there are any errors in or objections to the above, please notify us AT ONCE. If we do not receive such notice, it will be understood that you accept the basis on which we have entered your order and *the fulfillment of the orders will be made under the terms and conditions* of the contract evidenced by this Acknowledgment" [R. 91] (Italics supplied).

Paragraph 11 of those terms and conditions, did not use the exact term "die charge." It said that:

> *"Any charges* made by the seller therefor shall be for the use of such equipment only" [R. 4, 92, 430].

The term "therefor" referred to the first sentence of Paragraph 11, which said:

> *"Any* equipment (including jigs, printing plates or cylinders, DIES and tools, etc.) *which Seller constructs* or acquires *specifically and solely for use on Buyer's Order* shall be and remain Seller's property and in Seller's sole possession and control" [R. 4, 92] (Italics supplied).

Appellant's position was and is that the nine "die charges" listed in the contract were necessarily tied in, by Paragraph 11 of the "Terms and Conditions", since they are within the class of "any charges" and the contract provides for no charges for equipment, dies, etc., except in Paragraph 11, which is limited to equipment "specifically and solely" made for use on Buyer's Order.

The trial court held that appellant had a burden to prove by a preponderance of the evidence, presumably parol evidence apart from the contract itself, that these dies were made "solely" for use on Buyer's Order [R. 58, Par. II, Findings].

Appellee conceded that the dies were made "specifically" for appellant [R. 430]:

> "Mr. Duque: Your Honor, there is no question, and we do not evade the subject or argue it in any way, that the first set of dies originally made were made specifically to produce extrusions for Panaview. But there is a difference in the word 'specifically' and in the word 'solely'."

Appellant submits that no parol evidence was needed to establish the rather obvious tie-in of "die charge" in one part of the contract to "any charge" for "any equipment (including * * * dies)" in another part of the contract. The contract speaks for itself.

Moreover, paragraph 1 of the terms and conditions, read as follows:

> "This acknowledgment shall constitute the entire contract * * *." [R. 92].

It would be repugnant to say that parol evidence was required under such a contract.

Corpus Juris states the applicable canon of construction in this manner:

> "Words used in one sense in one part of a contract are as a general rule deemed to have been used in the same sense in another part of the instrument, where there is nothing in the context to indicate otherwise."
>
> 13 *C. J.* 532.

The California Supreme Court has clearly enunciated this same rule:

> "It is a familiar rule of construction that, other things being equal, words used in a certain sense in one part of an instrument are deemed to have been used in the same sense in another * * *. The words 'expiration of the term' occur in two other parts of the lease, and it cannot be said to be clear that in either instance they were intended to convey a different meaning."
>
> *Pringle v. Wilson* (1909), 156 Cal. 313, 319, 104 Pac. 316, 24 L. R. A. (N. S.) 1090.

Interpretation must be reasonable. (Cal. Civ. Code, Secs. 1643 and 3542.) Which is the more rational: (1) that the "die charges" on the front side of the document are of the same nature as the "charges" provided for on the reverse side for "dies" if made "specifically and solely" for Buyer, or (2) that the "die charges" are "service fees" [Find. No. II, lines 12-13, R. 58] completely different in nature from the "charge" for "dies" mentioned on the reverse side, even though no such "service fee" or other type of charge is mentioned anywhere in the terms and conditions? Under a second view, adopted in the Findings, Paragraph 11 becomes a sort of "dangling participle" referring to nothing and binding no one, and the "service fee" on the front side applies to dies made "speci-

cally" for Buyer, even though no such type of charge is provided for in the "Terms and Conditions". Moreover, the seller apparently gets all the benefits of Paragraph 11, but none of its burdens—even though Seller was the draftsman.

It is submitted that the trial court has violated the rule that "a writing is interpreted as a whole" [Restatement of Contracts, Sec. 235(c)].* As Circuit Judge Sanborn clearly stated the rule and its reason in *Pressed Steel Car Co. v. E. Ry. of Minn.* (8 C. C. A., 1903), 121 Fed. 609, 611:

> "The intention of the parties must be deduced from the entire agreement and from all its provisions considered together, because, where a contract has many stipulations, it is plain that the parties understood and agreed that their intention was not expressed by any single part or provision of their agreement, but by *every part and stipulation, so construed as to be consistent with every other part and with the entire contract*" (Italics supplied).

The contract uses this "die charge" term nine times, and under a column marked "Price" lists a dollar figure for each die [R. 254, 255]. Nowhere does the contract purport to specify whether these *die charge prices* are a *sale,* or a *service fee* or what not—unless Paragraph 11 is applicable. It is submitted that it is reasonable to apply Paragraph 11, and that any other interpretation is without reason and plainly arbitrary.

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*Also Cal. Civ. Code, Sec., 1641: "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."

As Mr. Justice Harlan said for a unanimous Court in *Neal v. Clark* (*Scruggs*) (1878), 95 U. S. 704, 708-709, 24 L. Ed. 586, 587:

> "It is a familiar rule in the interpretation of written instruments and statutes that 'A passage will be best interpreted by reference to that which precedes and follows it.' So also, 'The meaning of a word may be ascertained by reference to the meaning of words associated with it.' In Broom, Leg. Max., p. 523, it is said: 'It is a rule laid down by Lord Bacon, that *copulatio verborum indicat acceptionem in eodem sensu,* the coupling of words together shows that they are to be understood in the same sense. * * *' "

Likewise speaking for a unanimous Court, Mr. Chief Justice Fuller said, in *Burdon Central Sugar Co. v. Payne* (1897), 167 U. S. 127, 142, 17 S. Ct. 754, 42 L. Ed. 105, 110:

> "We should remember that the contract must be so construed as to give meaning to all its provisions, and that that interpretation would be incorrect which would obliterate one portion of the contract in order to enforce another part thereof."

Mr. Justice White well stated the rule in *O'Brien v. Miller* (1897), 168 U. S. 287, 297, 18 S. Ct 140, 42 L. E. 469, 473:

> "The elementary canon of interpretation is, not that particular words may be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them."

And in *Ladd v. Ladd* (1850), 8 How. 10, 28, 12 L. Ed. 967, 974, the Court said:

> "By every sound rule of construction, an instrument should be interpreted by the context, so as if possible to give a sensible meaning and effect to all its provisions; and so as to avoid rendering portions of it contradictory and inoperative,* by giving effect to some clauses to the exclusion of others."

II.

If Ambiguous, the Contract, Drafted by Appellee, Should Be Construed in Favor of Appellant.

The trial judge apparently looked upon the contract as ambiguous. He found no tie-in between "charge" for "dies", in Paragraph 11, and "Die Charge" as used elsewhere in the agreement. His comment on Paragraph 11 was:

> "Well, I wouldn't promote the lawyer who drafted that" [R. 405].

The judge further held that

> "Plaintiff has failed to establish by a preponderance of the evidence that the dies in controversy were constructed 'solely for use on Buyer's order' within the meaning of the contract" [Concl. of Law, No. I, R. 60].

It is submitted that such parol evidence would be admissible only if the contract is ambiguous or uncertain. (*Balfour v. Fresno Co.,* 109 Cal. App. 221, 41 Pac. 1062.) Certainly if the contract was clear, either that the nine "die charges" were or were not the same as the "die

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*The Lawyer's Edition incorrectly prints this word as "imperative."

charges" provided for in Paragraph 11, no parol evidence could be admitted. For example, if after each "die charge", the contract said "Par. 11 Applicable", or "Par. 11 not applicable", the contract would be clear to everyone.

Hence, the view below was that the contract was not clear on its face. If so, who has the burden of proof? Does it fall on the plaintiff, or does it fall on the one who drafted the document?

The California statute is clear:

> "In cases of uncertainty, not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. * * *"
>
> *Civ. Code,* Sec. 1654.

The Court below has held that the phrase "Die Charge", as used nine times in the contract meant "Service fee." The Court said:

> "It is also true that after said extrusion dies were manufactured by defendant, plaintiff paid to defendant a *service fee* for the use of said dies in the manufacture of extruded shapes therefrom" [R. 58] (Italics supplied).

This finding was made in the face of the following quoted stipulation and the other evidence hereinafter summarized:

> "Defendant manufactured nine sets of die tools. A charge was made by defendant to plaintiff of $1,430.00, denominated on the invoices as 'Die Charge Prices', but the parties reserve the right to produce testimony as to the nature of such charge" [R. 40, Par. 3, Stipulation of Facts].

Now, what was the evidence on this subject, and which way did it preponderate?

It is respectfully submitted that *all the evidence* as to the die charges was that they were made *under and pursuant to Paragraph 11* which applied only to *dies made solely and specifically* for Buyer!

Judicial Admissions.

The appellee made numerous judicial admissions that Paragraph 11 governed the dies in this case. These started in an early stage of the proceeding when appellee was arguing that a twisted interpretation should be made of Paragraph 11 so that it would not restrict use of the dies by appellee. Appellee's General Sales Manager, Mr. William O. Yates, made an affidavit on September 15, 1955, in opposition to appellant's application for a preliminary injunction, stating:

> "By written agreement with Panaview, * * * the dies which we made were to remain the property of Reynolds Metals Company and under Reynolds Metals Company's sole possession and control, and Panaview simply acquired a priority on the use of the dies whenever its orders for extruded shapes were received by us" [R. 25].

No writing existed, except Paragraph 11, which provided for appellee to *own the dies* or for any reference to further *use of the dies*. Mr. Yates was clearly of the view that Paragraph 11 applied, and that the legal question was merely whether appellant had a priority or an exclusive use!

Mr. Yates further deposed that:

> "If it had been the intention of Reynolds Metals Company to use dies exclusively for extruded shapes

for a particular buyer and for no other, it would have stated that *they would be used solely upon buyer's orders and for no others"* [R. 27] (Italics supplied).*

In opposing the preliminary injunction, Messrs. Duque and Lydick filed a "Statement of Reasons", adopting the same position to which Mr. Yates had sworn:

"It is also the custom in the aluminum extrusion industry, and, *generally, as here, a matter of specific contract for all property rights in the dies,* * * * *to vest in the extruder"* (Italics supplied).

The only *specific contract* to which counsel could possibly have reference is, of course, Paragraph 11 which vested in the appellee a limited title to dies made "specifically and solely" for the appellant's Order!

Moreover, the trial judge assumed that Paragraph 11 governed the title to the dies, and counsel for appellee made no objection or contrary argument. On page 405 of the Record, we find:

"The Court: Let's look at it this way: Is there any question but that the dies are the property *under the agreement,* of the defendant?" (Italics supplied).

At another point the Judge made this inquiry:

"The Court: Well, as I understand the defendant's contention, it is, *under Paragraph 11,* that notwithstanding the fact that plaintiff paid for the dies, that it is nonetheless the property of the defendant.

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*It is submitted that Mr. Yates' strange concept on draftsmanship, drawing a distinction between "solely upon buyer's order" and "solely upon buyer's orders and no others", even though successfully used to oppose an injunction, *pendente lite,* was so ridiculous that appellee was forced to abandon it and make its final argument on a different theory entirely!

Mr. Mahoney: That is correct, Your Honor.

The Court: *Is that a fair statement of the defendant's contention?*

Mr. Duque: *Yes, it is, your Honor."* [R. 87] (Italics supplied).

At another point in the trial, appellee's counsel argued that the "practice" of appellee regarding use of dies was "brought home" to appellant by Paragraph 11 on the reverse of Exhibit 2 [See R. 343-345]:

"Mr. Duque: We have already shown that it was brought home to plaintiff, your Honor, by the introduction of Plaintiff's Exhibit No. 2.

The Court: *You are relying upon the written statements on the reverse side of the order, are you, the invoice?*

Mr. Duque: *I am relying on that;* but I am trying to rebut any alleged other practice which may have lulled the plaintiff into a sense of security, or done something to them" [R. 345] (Italics supplied).

Thus, both the evidence, and the concession of counsel in Argument, were that Paragraph 11 did apply *so far as title to the dies was concerned.* Yet nothing could be clearer than that it applied *only if the dies were made solely for Buyer!*

Further Evidence.

Additional evidence to support an inference that these dies were made "specifically and solely" for Panaview came from the files of appellee. Reynolds made nine drawings before it constructed the nine dies. On each drawing it had a printed entry space for "Customer", and inserted therein only "Panaview" [R. 461-469]. Is not that business record of appellee inconsistent with any inference

that the dies were also constructed for another "customer", including appellee's own "Parts Dept"? Is it not, indeed, inherently improbable, in view of all these admissions and business records, that these dies were constructed for any purpose other than "specifically and solely" for use on buyer's order?

Moreover, at the time these dies were made, appellant had "patents pending" and an entry thereof was made on the original drawings submitted to appellee [Ex. 6, R. 457-458, See R. 318, defense witness Meyer as to Ex. 6]. Mr. Grossman testified about the patent applications later being dropped [R. 150].

Surely appellee would not confess that it intended from the inception to take appellant's original drawings, make dies therefrom, collect die charges therefor, and then surreptitiously use the dies for itself or others, until a patent was actually issued? [But compare, claim of "custom". R. 25-27, later abandoned, R. 292]. The notice that a patent would be sought was strong notice that the designs were not in the public domain!

Further is the fact that appellant paid a substantial die charge for these dies [R. 40]. Although defendant claimed this was not the full cost of the dies [R. 343; but *Cf.* R. 56], appellant also bought thousands of dollars worth of extrusions made with such dies, and presumably defendant made a profit on those transactions. Would it be normal for a party to pay a $1,430.00 die charge for another to make original dies according to an original design, if the maker of the dies was to own the dies and have an unrestricted right to use them for its own order or anyone else? [*Cf.* R. 414]. Would it not rather be the normal inference that the designer of dies, paying $1,430.00 therefor, would assume that the

"Paragraph 11" on the reverse of his contract was "applicable" and that he got, not title, but the exclusive or sole use of the dies, until he got notice that a year had elapsed without use and he must give "disposition" of the dies? By way of further argument, we can cite the opinion of appellee's own house counsel on the applicability of Paragraph 11 to all "die charges" made to the customer [R. 55-56]. Although appellee may not be bound by such opinions of its counsel in other situations, it is significant that its own counsel would render an opinion so at odds with its own present contention. At its very least, the contract must be somewhat ambiguous if its own counsel cannot consistently agree on its meaning.

Why was Paragraph 11 in the contract, if the only other reference to "die charges" therein was of an entirely different character? Who caused this uncertainty and misunderstanding?

Conduct of Parties.

In addition to the above evidence and concessions by counsel, the conduct of appellee argued strongly that it regarded appellant as having an interest in these dies under the contract. For example, counsel stated:

> "Mr. Duque: Yes, sir, And we admit that other sets of dies identical to *the dies that were made for* ***Panaview*** were prepared by Reynolds Metals Company to produce extruded shapes identical to the Panador. * * * We made the extruded shapes and component parts and sold them to Windsor. And then Windsor, using those component extruded parts and adding to them the other hardware and other things necessary to build the door, such as the glass and other hardware, took the extruded parts that we made for them, made a door and competed with Panador" [R. 85-86] (Italics supplied).

Counsel there conceded not only that these dies were *made for Panaview* but also that later other identical dies were made for Windsor.

Why would appellee bother to duplicate dies if it owned them outright with all rights to use them for anybody in the world, solely in its own discretion?

Surrounding Circumstances.

One of the circumstances* between appellant and appellee was the prior practice by which *appellee had previously interpreted the dies made on similar purchase orders to be subject to the corresponding die-clause of the then existing acknowledgment form.* Appellee had, on occasion written letters to appellant asking whether dies should be destroyed or stored [R. 142-144]. The clause then in use, numbered 12, is found in Exhibit 5 [R. 110-A] and reads in pertinent part as follows:

> "12. Equipment: Any equipment * * * which Seller constructs or acquires *specifically* for use on Buyer's order shall be and remain Seller's property and in Seller's sole possession and control, and any charges made by Seller therefor shall be for use of such equipment only. *All equipment will be used exclusively for the manufacture of products for Buyer.* When for a period of one (1) year no orders are accepted from Buyer for products to be made with such equipment, Seller may make such use or disposition thereof as it desires without liability to Buyer. Such equipment or any material owned or furnished by Buyer while in Seller's possession will be carefully handled and stored by Seller, but Seller

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*In California law, the surrounding circumstances are always of importance, in order that the judge will be in the shoes of the parties when he makes his interpretation (Civ. Code, Sec. 1647; Code Civ. Proc., Sec. 1860; *Woodbine v. Van Horn* (1946), 29 Cal. 2d 95, 104, 173 P. 2d 17).

> shall have no responsibility for loss or damage thereto. Tool charge designated estimates will vary in accordance with actual cost" (Italics supplied).

It was while such form was in use that appellant was directly advised that it had exclusive use of dies on which it paid die charges [R. 144-145]. This testimony was left undisputed and uncontradicted by appellee's witness, Sargeant [R. 71-21, 337-338].

It is readily apparent that the change from Paragraph 12 to the present Paragraph 11 involved primarily only form, not substance. The second sentence, italicized in the above quotation, was eliminated and the phrase "and solely" was inserted into the first sentence, after the word "specifically." It is submitted that no customers would perceive any change in the meaning of the two forms, and that only a Philadelphia lawyer could dream up the idea that some extraneous parol evidence is required to prove that dies made specifically as described on the front side of the agreement were subject to the only printed clause in the agreement which mentioned dies! No layman would ever think of such a technicality, and, of course, appellee made no explanation to the appellant, at the time it changed the clause. Indeed, appellee's own witness and house counsel gave interpretation consistent only with the clause being applicable in this case! [Compare R. 26-27, 55-56]. It is significant that Mr. Yates, who gave his *opinion* by affidavit on September 15, 1955, *before appellee changed its defense,* confirmed it and swore, at the trial, on November 22, 1955, that he had read his affidavit, and, to quote the record [R. 307]:

> "Q. By Mr. Duque: You know its contents to be true and correct as of this date? A. That is correct.
>
> Q. And you are willing to reaffirm the statements made therein under oath at this time? A. Yes, I am"

Law: Presumptions.

Under the California rule on presumptions, even if there were a presumption in favor of appellee which put the burden on appellant to establish that the dies were made under Paragraph 11, his presumption would have been dispelled by appellee's own "evidence * * * inconsistent therewith," *(Smellie v. So. Pac. Co.,* 212 Cal. 540, 555, 299 Pac. 529),—here the evidence and claims by defense witnesses and counsel that Paragraph 11 did apply and gave appellee the right to do what it did.

Law: Judicial Admissions.

The law regarding judicial admissions is elementary, but it is necessary to discuss it here because defense counsel and the Court below seem to have ignored the rules altogether.

> "The vital feature of a judicial admission is universally conceded to be its *conclusiveness* upon the party making it * * *"
>
> Wigmore on Evidence, Sec. 2590.

A 1919 case in the Seventh Circuit, in the field of unfair competition, held that

> "In a real and legitimate controversy, a party should be left within the knot of his averments in pleadings and *admissions in testimony,* unless the Court can find an absolute demonstration from other evidence * * * that under no circumstances could the averments and admissions be true." (Italics supplied).
>
> *Larson Jr. Co. v. Wrigley, Jr. Co.,* 253 Fed. 914.

In *Hill v. Fed. Trade Com.* (1941), 124 F. 2d 104, 106, the Court said

> "* * * [I]t is fundamental that judicial admissions are proof possessing the highest probative value. Indeed, facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them."

Appellant therefore submits that the overwhelming weight of the evidence—indeed, without any conflict—established that Paragraph 11 was applicable, and that appellee's own counsel and chief witness claimed the clause was applicable both before and during the trial.

III.

A Property Right Existed in Appellant Because of Its Creation of Original Designs for Sliding Doors Submitted in Confidence to Appellee.

Counsel for the defense admitted the submission to it of designs which were the creation of appellant's officer [R. 96]:

> "Mr. Duque: We do not dispute that an original drawing which was submitted was apparently his creation."

The appellee admitted the receipt of the drawing, Exhibit 6, showing appellant's design and the making of the drawings, Exhibit H, therefrom.

It is evident, therefore, that the information transmitted by appellant to appellee was privately owned and was not intended for public distribution but was submitted to appellee to permit it to fabricate dies so that it could supply extrusions to appellant and make a profit by supplying the extrusions.

The aggravation of the wrong done by appellee lies in the fact that it was permitted to have access to appellant's secret so that it could make a profit from appellant and then, while making such a profit, breached its trust with appellant, stole its customer, and entered into competition by selling extrusions of appellant's design to appellant's customer.

The principles of law applicable are well settled and are well stated in Section 757 of the Restatement of Torts as follows:

> "One who discloses or uses another's trade secret, without a privilege to do so, is liable to the other if: * * *
>
> '2. his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him'."

It has been held that a trade secret, whether a secret formula, process or otherwise, is property, with power to make use of it to the exclusion of the world. *Herold v. Herold China & Pottery Co.* (C. C. A. 6, 1919), 257 Fed. 911, 913.

In *Holley v. Hunt* (1936), 13 Cal. App. 2d 335, 56 P. 2d 1240, the court clearly stated the property right in trade secrets and confidences as follows:

> "It is simply a controversy to prevent appellants from wrongfully using to their own advantage and to respondent's detriment information and ideas which they had received from the latter while manufacturing the metal toe protectors for him" (p. 336).

As stated in *Morrison v. Woodbury,* 105 Kan. 617, 185 Pac. 735:

> "The law recognizes property rights in trade secrets and confidences, and a court of equity may, when jurisdiction is properly invoked, enjoin one in whom confidence has been reposed from divulging it to third persons or from taking advantage of it himself to the injury of the owner."

In *John T. Lloyd Laboratories, Inc. v. Lloyd Bros. Pharm.* (C. C. A. 6, 1942), 131 F. 2d 703, 707, the court stated:

> "It is true that secret formula and processes are property rights which should be protected by injunction against those who attempt to disclose or use them in violation of confidential relationships."

There is no necessity that a trade secret rise to the level of invention, but merely that the secret be the product of the mind of the creator unknown to the one who accepts the information in confidence and ultimately breaches the confidence. In *A. O. Smith Corp. v. Petroleum Iron Works Co.* (C. C. A. 6, 1934), 73 F. 2d 531, the court held:

> "The mere fact that the means by which a discovery is made are obvious, that experimentation which leads from known factors to be ascertainable but presently unknown result may be simple, we think cannot destroy the value of the discovery to one who makes it, or advantage the competitor who by unfair means, or as the beneficiary of a broken faith, obtains the desired knowledge without himself paying the price in labor, money or machines expended by the discoverer."

IV.

Confidential Relationship May Be Implied From the Acts of the Parties and No Express Agreement Need Be Made.

Appellant submitted a drawing, Exhibit 6, in confidence to appellee. Appellee made dies from the drawing and used the dies to its own profit and appellant's disadvantage. Appellee attempted to defend its position on the ground that there had been no express statement that the drawing was to be kept in confidence. It is well established, even in the absence of an express agreement, a confidential relationship will be implied from the acts of the parties to the relationship. In *Hoeltke v. C. M. Kemp Mfg. Co.* (C. C. A. 4, 1935), 80 F. 2d 912, 923, the court held:

> "Where . . . an invention is disclosed to one who, in breach of confidence thus reposed manufactures and sells articles embodying the invention, such person should be held liable for the profits and damages resulting therefrom, not under the patent statutes, but upon the principle that equity will not permit one to unjustly enrich himself at the expense of another.
>
> "While there was no express agreement that defendant was to hold the information so disclosed as a confidential matter and to make no use of it unless it should purchase the invention, we think that in equity and good conscience such an agreement was implied; and having obtained the disclosure under such circumstances, defendant ought not be heard to say that there was no obligation to respect the confidence thus reposed in it."

Despite the absence of an express promise to keep information confidential, one may be implied when the

sole purpose of the disclosure is to enable the defendant to consider whether it wants the business.

Smith v. Dravo Corp. (C. C. A. 7, 1953), 203 F. 2d 369, 377;

Ackerman v. Gen. Motors (C. C. A. 4, 1953), 202 F. 2d 643, 646 (per Parker, C. J.)

Consol. Boiler v. Bogue Elec. Co. (1948), 141 N. J. Eq. 550, 55 A. 2d 759.

It is, of course, well established that the submission of drawings to a potential purchaser or manufacturer can create a confidential relationship. In *Booth v. Stutz Motor Car Co.* (C. C. A. 7, 1932), 56 F. 2d 962, 968. Booth submitted layouts to Stutz of a new design of car and Stutz used the layouts in a car without compensating Booth. The court held as follows:

> "To the extent, therefore, that the Booth plans, communicated in confidence to Stutz did enter into the design of the Stutz car, Stutz did inequitably appropriate those plans and should account to Booth therefor."

Appellee also argued that it had not disclosed the information which was presented to it by appellant to any one else, but this is not the wrong of which appellant complains. The wrong complained of was the misuse of the information by taking dies made in accordance with appellant's drawing and using them to appellant's disadvantage and in competition whereby appellee supplied appellant's own customer $150,000.00 worth of parts.

In *Smith v. Dravo, supra,* 203 F. 2d 369, 377, the defendant had used information acquired from plaintiff in designing its own product, and an injunction was ordered.

V.

The Public Sale of Articles Made in Accordance With Confidential Drawings Did Not Destroy the Confidential Relationship Between the Parties as to Such Drawings.

Appellee defended the charge of breach of confidential relationship upon the ground that the sliding doors manufactured in accordance with the drawing of appellant were sold in the open market and that any one could copy the doors with impunity. However, it was established, as a matter of judicial notice, that it would be a time-consuming, expensive, and laborious procedure to make copies of the doors, then make dies from the doors and manufacture extrusions from the dies [R. 132-134].

> "Q. Now, Mr. Grossman, if you, as a manufacturer of aluminum sliding doors consisting largely of aluminum extrusions, were to attempt to make a copy of an aluminum-frame-and-sash sliding door such as the Panador, would this be a simple task?
>
> A. It wouldn't.
>
> Mr. Duque: I object on the grounds that it is incompetent, irrelevant, and immaterial; conjectural; and has no bearing on any of the issues in this case, what Mr. Grossman might do as a manufacturer if he were to take down somebody else's doors.
>
> The Court: What is the purpose of it?
>
> Mr. Mahoney: The purpose of this question, your Honor, is to show that it would not be a simple task for anybody to take a structure of the relative complexities that this consists of, as it does, of numerous extrusions, to measure up each extrusion without the knowledge behind it that goes to make up the working assemblage and easily and quickly get into the market in competition with the manufacturer orig-

inally manufacturing the device—that this would be a time-consuming, expensive, and laborious procedure.

The Court: You mean to someone starting—

Mr. Mahoney: From scratch.

The Court: I don't think you need any evidence on that. It would be a matter of common knowledge, wouldn't it?

In the first place, someone would have to produce the drawings and then someone would have to produce the dies and then you would have to get in production with it.

Mr. Mahoney: Well, your Honor, if the defendant wishes to stipulate to that. This is a subject—

The Court: Well, even if they refuse to stipulate to it, I would assume it was so."

The significance of this judicial notice is the fact that if appellee had not had recourse to the dies made from appellant's drawing, it would have been unable to supply extrusions for the doors to the customer of appellant in sufficient time to permit the customer of appellant to avoid purchasing doors from appellant. Thus, the position of the Court clearly establishes that it was the position of trust and confidence which appellee assumed that permitted it to ruthlessly appropriate the business of appellant and to breach, in a most inequitable and unfair manner, its fiduciary obligation to appellant.

In *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236, 25 S. Ct. 637, 639, 49 L. Ed 1031, the plaintiff collected stock quotations, which it furnished its customers. Said Mr. Justice Holmes of its tabulation:

"It stands like a trade secret. The plaintiff has the right to keep the work which it has done, or paid

for doing to itself. The fact that others might do similar work, if they might, does not authorize them to steal the plaintiff's."

It has been held that the fact that a defendant which breached its relation of trust and confidence might have obtained the confidential information elsewhere is immaterial where defendant used the confidential information to implement its breach of trust. In *Frank v. Wiltschek,* 209 F. 2d 493 (C. A. 2, 1953), there was involved a situation where a plaintiff developed a process of making perfumed face cloths. The plaintiff hired salesmen to sell the face cloth and they were shown the secret process to familiarize themselves with the product. The Court held that by this disclosure the salesmen incurred a duty not to use such information to the detriment of the inventor. The Court further held that the plaintiff was entitled to an accounting even though the salesmen could have obtained information on the secret process from a study of an expired patent and the inventor's publicly marketed product, in the following language:

"Defendants argue that the heart of plaintiff's process was revealed by an expired patent, and that the improvements were unpatentable applications of mechanical skill. This totally misconceives the nature of plaintiff's right. Plaintiffs do not assert, indeed cannot assert, a property right in their development such as would entitle them to exclusive enjoyment against the world. Theirs is not a patent, but a trade secret. The essence of their action is not infringement but breach of faith. It matters not that the defendants could have gained their knowledge from a study of the expired patent and the plaintiffs pub-

licly marketed product. The fact is that they did not. Instead they gained it from plaintiffs via their confidential relationship, and in so doing incurred a duty not to use it to plaintiffs' detriment. Their duty they have breached."

A similar holding is found in *Sketchley v. Lipkin* (1950), 99 Cal. App. 2d 849, 854, 222 P. 2d 927, where the Court held:

"Thus by the cited authorities it is established that the owner of an unpatented device is protected against the piracy of his invention because it is his own by virtue of being the original product of his mind. But the strong arm of equity reaches even further. When a contractee has gained an intimate knowledge of such an invention by virtue of an agreement to use it according to specified terms and thereafter repudiates the agreement, the contractor will be awarded injunctive relief to prevent the use of such knowledge of his secret process or invention so gained from him by his contractee."

It is apparent that the Court clearly realized the fact that the appellee did not resort to the publicly sold product, but relied on the information received from appellant in confidence. The Court's recognition of the difficulties that would have been encountered if the publicly sold product had been used is in complete accord with the leading case of *Tabor v. Hoffman* (1889), 118 N. Y. 30, 23 N. E. 12, which was a suit to restrain the defendant from using certain patterns surreptitiously copied from patterns belonging to the plaintiff and used by the plaintiff in making a rotary pump where it was conceded that the pump was on the market. The point advanced and sustained

by the Court was that, since plaintiff had discovered means in its patterns which clearly aided in the manufacture of pumps and he had not purchased the patterns, he was entitled to preventive remedies. The Court pointed out that the size of the patterns could not be discovered by merely measuring the different parts of the pump since various allowances for shrinkage and expansion were required which could only be ascertained by a series of experiments involving the expenditure of both time and money. In its holding, the Court stated:

> "The size of the patterns cannot be discovered by merely using the different sections of the pump but various changes must be made, and those changes can only be ascertained by a series of experiments, involving both the expenditure of time and money. Are not the size and shape of the patterns, therefore, a secret which the plaintiff has not published, and in which he still has an exclusive property?"

Also in accord is the case of *Smith v. Dravo* (C. C. A. 7, 1953), 203 F. 2d 369, 379, holding it is no defense to an unfair competition case of this nature that defendant could have gained knowledge of his competitor's product by lawful means, and thus duplicated it, if *in fact* the information was submitted in confidence and then used by the defendant for its own advantage and account, without the trouble and delay incident to the inspection and analysis and other steps usually necessary to duplicate an unpatented product.

VI.

The Essence of the Wrong Done By Appellee Lay in Its Breach of Trust and Misuse of Confidential Information Submitted to It by Appellant for Its Own Profit.

There was no proof in the record that the appellee actually made drawings from the door which was allegedly submitted to the appellee by Windsor Manufacturing Company. As stated in the affidavit of Harry M. Sargeant, Exhibit C [R. 19-20].

> "Subsequent to this luncheon meeting, Windsor submitted to us a sample sliding door which they were selling to W. P. Fuller & Co. The door was dismantled by our manufacturing people and the component parts which we were to make were priced by us on that basis according to the sample which had been submitted. Along with the sample of the sliding door, Windsor also submitted samples of their sliding window, as well as samples for tub enclosures and shower doors. In accordance with our custom, I then prepared quotations for each component that we were to supply, as well as a quotation to cover the tooling costs at our Parts Division plant in Phoenix, Arizona. The quotations were submitted to Windsor and thereafter they placed an order with us for the manufacture of the aluminum components to be assembled by them in the manufacturing of the Windsor sliding door."

Further, the affidavit of James M. Hairston clearly stated that the extrusion division merely received orders for extrusions from the parts division [R. 32]:

> "Some time during the month of November, 1954, we received through the Parts Division Plant of the

> Reynolds Metals Company at Phoenix a production order for the manufacture of extrusions to be further fabricated by the Parts Division Plant and, in turn, shipped to Windsor Supply, Inc., as fabricated parts. The material required by this production order was to be manufactured under eight new extrusion section numbers, numbers 13250 through 13257, inclusive. In the processing of this production order, it was determined that the sections called for were the same as the sections as produced for Panaview. Therefore, following the normal and customary usage and practice of not only Reynolds Metals Company, but to the best of my knowledge of the extrusion industry generally, our existing die tools made under 'T' orders, numbered 3318 through 3325, inclusive, which had been previously used by us in producing extruded shapes, numbered 10414 through 10421, inclusive, for Panaview, were now used by us to produce the extrusions called for by the Windsor order."

At no time during the trial did appellee produce any evidence that the parts of appellant's door submitted to it by Windsor Manufacturing Company had been measured and drawn by appellee on behalf of Windsor Manufacturing Company.* As stated in the affidavit of Mr. Hairston, the dies designed from appellant's drawing were immediately used for appellee to produce extrusions for Windsor. The tremendous unfair advantage achieved by the appellee in this regard is evidenced by the fact that it was able to supply extrusions to Windsor immediately, whereas, appellant was compelled, on its first order, to wait from April 20, 1954 to October, 1954 [R. 39].

---

*The burden of proof is on defendant to establish that its construction was the result of independent effort. Parker, C. J., in *Ackermans v. General Motors* (C. C. A. 4, 1953), 202 F. 2d 642, 646.

VII.

Appellee Unfairly Competed by Using Confidential Information to Alienate Appellant's Customer and to Engage in the Sale of Aluminum Sliding Door Parts of Appellant's Design in Competition With Appellant.

A defense made by appellee to appellant's charge of unfair competition was that the appellee was not at any time in competition with the appellant because the appellee only sold the extrusions for the sliding doors to appellant's customer and did not sell the incidental hardware that went into the sliding door. However, it was established that appellee supplied the Windsor Manufacturing Company with component parts for five thousand (5,000) doors and the Court clearly stated this stipulation in the record [R. 182]:

> "The Court: Now, except for the parts that Mr. Oldenkamp mentioned in this last answer, is it stipulated that from September, 1954, to date the Windsor Company has purchased from the Reynolds Company, and the Reynolds Company has supplied the Windsor Company with component parts for approximately 5,000 doors?
>
> Mr. Mahoney: Yes, your Honor.
>
> The Court: So stipulated by the defendant?
>
> Mr. Duque: So stipulated, Your Honor.
>
> The Court: Very well."

Furthermore, the Court took judicial notice of the fact that if appellee had not supplied essential components of the sliding door designed by appellant to Windsor, the former customer of appellant could not have shipped sliding doors to a customer [R. 183]:

> "Mr. Mahoney: Well, then, your Honor will take it as a matter of judicial notice that Reynolds

Metals Company was supplying essential components of the sliding door, which lacking, the door could not be placed in a carton and shipped to a customer.

The Court: That would be correct, would it not, Mr. Oldenkamp?

The Witness: That's right.

The Court: The witness so states."

It was also stipulated that a total sum of parts sufficient to make in excess of five thousand (5,000) doors was supplied by appellee to the former customer of appellant's [R. 180]:

"The Court: How many of these knocked-down door parts did you buy from Reynolds Metals Company?

The Witness: There was a tabulation made yesterday, and I didn't see the total. All I saw was the scratch sheet that showed the number of doors that were involved.

Mr. Mahoney: The total—and this is an approximate total—number of sets of doors which were ordered was 5,712. And there were shipped 4,929.

And there is an indication that there was also shipped an additional 364, which would bring the total well over 5,000.

The Court: Well, are you willing to stipulate that Windsor purchased from Reynolds the parts which when assembled would approximate 5,000 completed doors?

Mr. Duque: I can't stipulate to that, your Honor. I can stipulate that Reynolds shipped to Windsor milled extruded shapes in bulk which, when put together with other component parts which were purchased from other people and which they packaged, made up approximately 5,000 doors."

It is submitted that by so doing, appellee competed unfairly with its own customer, the appellant, and used unfairly the knowledge which it had gained from its relationship with its own customer, the appellant, to the severe damage and injury to appellant.

Moreover, it is well established that there need be no direct competition between appellee and appellant to sustain a judgment of unfair competition. In *Sunbeam Furniture Corp. v. Sunbeam Corp.,* 191 F. 2d 141, 144 (C. A. 9, 1951), the Court held as follows:

> "It is true that actual competition, while an important factor to consider, is not a necessity to the granting of relief."

See also:

Winfield v. Charles (1946), 77 Cal. App. 2d 64, 70. 175 P. 2d 516.

Conclusion.

The judgment below should be reversed with instructions to enter judgment for a permanent injunction against appellee's use of the dies, or any dies made with information from appellant's drawings, for appellee's own account or for third parties, and awarding appellant damages for breach of contract, breach of confidential relations and unfair competition, in the amount of one hundred and fifty-thousand dollars.

Respectfully submitted,

MACBETH & FORD,

THOMAS P. MAHONEY,

PATRICK H. FORD,

Attorneys for Appellant.

No. 15059

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PANAVIEW DOOR & WINDOW CO., a corporation,

Appellant,

vs.

REYNOLDS METALS COMPANY, a corporation,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division. Hon. Wm. C. Mathes, Judge.

APPELLEE'S BRIEF.

ADAMS, DUQUE & HAZELTINE,
532 West Sixth Street,
Los Angeles 14, California,
Attorneys for Appellee.

HENRY O. DUQUE,
LAWRENCE T. LYDICK,
JAMES S. CLINE,
Of Counsel.

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No. 15059

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PANAVIEW DOOR & WINDOW CO., a corporation,

Appellant,

vs.

REYNOLDS METALS COMPANY, a corporation,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division. Hon. Wm. C. Mathes, Judge.

APPELLEE'S BRIEF.

Motion to Strike.

Appellee herewith respectfully moves this Honorable Court for an order striking from the record on appeal in the within cause (1) the entire exhibit set forth at pages 55 and 56 of the Transcript of Record, (2) the reference to said exhibit at page 54 of the Transcript of Record, and (3) the entire document marked for identification as Plaintiff's Exhibit 14 set forth at pages 198-207 of the Transcript of Record. Said motion is based upon the record on appeal in the within cause and the memorandum of Points and Authorities immediately following.

Points and Authorities in Support of Motion to Strike.

In an attempt to obtain the reversal of the judgment entered below, appellant has improperly sought to influence this Court by including in the record on appeal a document alleged to have been written by an attorney on behalf of appellee, but which was not offered or received in evidence at the trial of this action. This was done even though, according to counsel's own statement [Tr. p. 54], the document was available at the time of trial. Appellee objects most strongly to the inclusion of said document in the record on appeal and to the method adopted by appellant's counsel in this regard. The circumstance of the writing of said letter, the related correspondence and the background of the situation involved are not before this Court. Appellant has adopted a most improper mode of attacking the judgment rendered by the Hon. Wm. C. Mathes, Judge—unfair both to appellee and to the trial court.

Appellee has also improperly included in the record on this appeal a document containing inadmissible hearsay declarations. [Tr. pp. 198-207.] This document was marked for identification as Plaintiff's Exhibit 14 but was not received in evidence.

The case must be tried here upon the record made at the original trial. Matters which are not before the trial court will be stricken on motion even if the matter has been included in the record on appeal by stipulation.

F. R. C. P., Rule 75(h);

Heath v. Helmick, 173 F. 2d 156 (9th Cir., 1949);

Black & Yates v. Mahogany Ass'n., 129 F. 2d 227, 237 (3rd Cir., 1941).

Statement of the Case.

Introduction.

This is an action by appellant Panaview Door & Window Co., a California corporation, owned and operated by Mr. Grossman and Mr. Reznick, against appellee Reynolds Metals Company, a Delaware corporation. Appellant's complaint sought damages for breach of an alleged contract, damages for breach of an alleged confidential relation, and a permanent injunction restraining appellee from alleged unfair competition. [Tr. pp. 3-9.] Appellee's answer specifically denied the existence of the alleged contract, the existence of a confidential relation and the existence of any unfair competition. [Tr. pp. 9-11.]

The basis of appellant's claim arises out of its insistence that Paragraph 11 (contained in appellee's acknowledgment of orders for extrusions [Ex. 2; Tr. p. 92]) constitutes an agreement that the dies used by appellee in the production of such extrusions shall be used solely and exclusively for appellant. The essence of this claim is breach of contract. While relief is also sought in terms of "a confidential relationship" and "unfair competition," appellant conceded in opening argument that its real and only basis of claim depended upon the existence of a contract, a contract providing for appellant's sole and exclusive use of the dies in question. [Tr. pp. 73-74.]

Appellee contends simply that no contract, written or otherwise, ever existed whereby appellee at any time agreed to keep such dies for appellant's sole and exclusive use. With this the trial court agreed and found that no such contract ever existed. [Findings of Fact* Par. II, Tr. p. 58.]

---

*Hereinafter abbreviated FF.

The Parties.

In order to properly analyze and understand this action, one must at the outset consider the parties involved and the nature of the industry in which each operated.

Appellant Panaview Door & Window Co. is a California corporation engaged in the business of producing and selling, among other things, sliding glass doors. Appellant's production process consists only of the assembly and combination of various components purchased from others rather than of the actual manufacture of the parts involved. [Tr. pp. 116, 265-269.] Because of the nature of this production process, it is relatively easy for others to enter and leave the field. The business of appellant is, therefore, a very competitive one. [Tr. p. 114.] There are not only many persons engaged in the same business but also many sliding glass doors on the market, both aluminum and steel. [Tr. p. 230.] While they, of course, are not all identical, they are all similar in both design, manufacture, shape and appearance. [Tr. pp. 36-38.] The particular sliding glass door here in question is called a "Panador." It is not patented and should be distinguished from another sliding glass door produced by appellant called a "Panaview door" which is patented. [Tr. pp. 149-150.] Appellant is also engaged in producing and selling sliding windows. [Tr. p. 365.]

The "Panador" is not a unique product. [Tr. pp. 20-21, 37.] Although appellant on this appeal apparently seeks to rely upon the fact that the drawings submitted to appellee bore the mark "Patent Pending" (A. O. B. pp. 2, 20), appellant conceded at two different times at the trial of this action that no patent was in any way involved. [Tr. pp. 141-142, 150.] Appellant also con-

ceded that the elements of "palming-off," secondary meaning and confusion in the public mind were not present and did not enter into this case. [Tr. pp. 69, 73, 78, 422, 425.]

Abraham Grossman is the president of appellant and according to his testimony, acts as appellant's designer, engineer and production head. [Tr. pp. 93-94.] Jerry L. Reznick is the vice-president and general manager of appellant. [Tr. pp. 223-224.] Louis Pinson is the assistant secretary and assistant general manager of appellant. [Tr. p. 258.]

Appellee Reynolds Metals Company is a Delaware corporation and the second largest producer in the world of aluminum in its various forms. As such, appellee produces, among other things, aluminum extrusions. An extrusion, in its generic sense, is any item that is forced, pressed or pushed out. An aluminum extrusion is a shape which is formed by forcing a hot billet of aluminum through a die by the use of large presses. The die itself, though important in conforming the extrusion to the shape desired, is a relatively insignificant part of the total equipment used in the manufacture of aluminum extrusions. Appellee did not produce the sliding glass door here in issue or even all of its component parts. It merely manufactured certain aluminum extrusions which were sold to appellant who then combined them with other essential parts and materials in the ultimate production of a glass door. [Tr. pp. 20, 230.]

In paragraph IX of its complaint, appellant alleged that it was the universal custom in the aluminum extrusion industry that the supplier of extrusions must keep confidential all information disclosed to it by customers

and must use dies paid for by one customer only for that customer's order. [Tr. pp. 6-7.] At the trial of this action, appellant completely abandoned this contention and offered no evidence in its support. [Tr. pp. 294-295.]

The uncontroverted evidence introduced by appellee on the other hand, showed that it is the custom in the aluminum extrusion industry—a custom invariably followed by all extruders—for the extruder to manufacture shapes to the request and specification of a buyer without in any way attempting to determine whether or not a property right in the design existed in the buyer or elsewhere. It is, therefore, not unusual in the extrusion industry to find that the same shape is being sold to two or more customers without the knowledge or consent of the other. The only exception and only situation where the use of the dies is restricted to the particular buyer for whom the dies are made is in the case of classified or secret military products or highly specialized, technical or unique equipment—a situation not presented by the facts of this case. [Tr. pp. 25-27.]

Statement of Facts.

For a few years prior to 1953 appellee Reynolds Metals Company did business with Glide Windows, Inc., a corporation which was then owned and operated by Mr. Grossman and Mr. Reznick. During those years, orders were placed by Glide Windows, Inc., for the manufacture of extruded shapes to be used by Glide Windows, Inc., in the production of a sliding window. In the early part of 1953, Glide Windows, Inc., was unable to pay appellee's bill for the last order of extruded shapes, and after that time no further orders were accepted by appellee from Glide Windows, Inc., because of the latter's precarious financial condition. At that time Glide Windows, Inc.,

was indebted to appellee in the sum of $16,824.72. [Tr. p. 13.]

In support of his contention that the dies involved in the case at bar were to be used exclusively for appellant and no one else, Mr. Grossman was allowed to testify over objection with respect to the prior dealings between Glide Windows, Inc., and appellee. In this connection Mr. Grossman testified that he clearly recalled that in 1948 and while he was acting for Glide Windows, Inc., Mr. Sargeant, sales manager for appellee, told him that the dies used to produce sliding window extrusions would be for the exclusive use of Glide Windows, Inc. [Tr. pp. 99-101, 136-137.] This testimony proved of no value to appellant, however, since the form of written acknowledgment then used expressly provided that "all such equipment will be used exclusively for the manufacture of products for Buyer." [Ex. 5; Tr. pp. 108-110A.] As will be subsequently pointed out, no such provision existed in the acknowledgment in use between appellant and appellee in 1954. Although Mr. Grossman "clearly recalled" what Mr. Sargeant had allegedly told him in 1948, he could not remember whether he had read the acknowledgment in use in 1954. [Tr. p. 145.]

In further support of his contention, Mr. Grossman testified that in November, 1951 appellee had requested permission of Glide Windows, Inc., to use the Glide dies for another customer. Exhibits 3 and 4 were introduced to substantiate this testimony. [Tr. pp. 103-107.] Under cross-examination this testimony was completely refuted and it was shown that appellee had merely asked whether the dies should be stored or destroyed. [Tr. p. 143.] Subsequently, appellant introduced Exhibits 16 through 20 to show that appellee had previously asked permission to use Glide dies for another customer in April, 1951. [Tr. pp. 247-252.] Under questioning by the court, how-

ever, Mr. Grossman conceded that the dies involved (unlike the dies here in question) related to patented products. [Tr. pp. 250-251.] Appellant has not included any of these exhibits in the record on appeal.

In the early part of 1954, William O. Yates, the Regional General Sales Manager of appellee, called on Mr. Reznick to inquire why the long overdue account of Glide Windows, Inc., had not been paid to appellant. At the time of this call, Mr. Reznick was an officer in both Glide Windows, Inc., and appellant Panaview Door & Window Co. After discussion of the financial situation of Glide Windows, Inc., Mr. Reznick informed Mr. Yates that his new corporation, Panaview Door & Window Co., which apparently had substantial financial backing, was interested in having some extruded shapes manufactured in connection with a sliding door which it was producing and inquired whether appellee would be interested in manufacturing the extruded shapes required. Mr. Yates told Mr. Reznick that appellee would be interested in manufacturing the extruded shapes if the Glide Windows, Inc., account was either paid or some regular method for payment was established and if appellee's credit department would approve the financial statement of appellant Panaview Door & Window Co. [Tr. pp. 23-24, 307-311, 224, 226-230.]

Subsequently, Glide Windows, Inc., delivered to appellee promissory notes in the total sum of $16,824.72, on which notes there still remains a balance due and payable of $2,000.00. [Tr. pp. 13, 231 and 299.] Thereafter, the credit of appellant Panaview Door & Window Co. was approved by Frank K. Miles, Regional Credit Manager of appellee, on the basis of appellant's balance sheet dated December 31, 1953, showing a working capital of $164,-174.00. [Tr. pp. 13-14.]

Sometime in April of 1954, Mr. Grossman submitted to appellee's salesman, Al Kavich, a drawing of the various parts of the "Panador" sliding glass door. [Ex. 6; Tr. pp. 457, 111-112, 118.] While Mr. Grossman admitted that he did not discuss with Mr. Kavich either the use of the dies to be made or the nature of the die charge [Tr. pp. 121, 156], Mr. Grossman claimed that he told Mr. Kavich that the information contained in the drawings should be held in strict confidence by appellee. [Tr. p. 120.] On cross-examination, however, Mr. Grossman admitted that all he told Mr. Kavich was that "Panador" was a new product and that he requested Mr. Kavich personally not to disclose to any salesman of competitng companies the fact that Panaview was in the process of producing the "Panador." [Tr. p. 156.] This request was made personally to Mr. Kavich because of the highly competitive nature of the sliding door business.

At no time in any stage in the placing of appellant's order was there any indication, suggestion or discussion of any kind that the work being performed for appellant or the designs of such work were of a secret, confidential or unique nature. [Tr. pp. 26, 32, 36.] The only conversation which at all relates to this is the alleged conversation between Mr. Grossman and Mr. Kavich above referred to. [Tr. p. 158.]

After the drawing was received by appellee, it was processed by appellee's Extrusion Engineering Department under the direction of O. J. Meyer, Jr., and individual detailed section drawings [Ex. 8] were made of each part. The section drawings were then approved by Mr. Grossman. [Tr. pp. 36, 125.] In order to substantiate his claim that the Panador was unique and original and, therefore, that its design was of a confidential nature, Mr. Grossman testified that he alone created the original design without copying prior art

[Tr. p. 113] and that appellee did not provide him with any design assistance whatsoever. [Tr. p. 126.] In this connection he twice testified that his original drawing [Ex. 6] was identical with the individual section drawings [Ex. 8] prepared by appellee. [Tr. pp. 126, 147-148.] Although Exhibit 8 has not been included in the record on appeal in order to substantiate appellant's claim in this respect, the record shows that Exhibit 8 was marked on its face "Revised." Mr. Grossman admitted that this was done by someone in his organization but claimed that it was done by mistake. [Tr. pp. 128-129, 156-157.]

In further rebuttal of Mr. Grossman's claim that appellee did not provide him with any design assistance, Mr. Meyer, appellee's Regional Extrusion Engineer, testified in detail concerning the modification in design and design assistance furnished by appellee. In this connection he testified that "special assembly tolerances" were added to the jamb and top rail parts [Tr. pp. 319-320, 322], that the design on the serrations was changed [Tr. p. 321], and that the design of the weatherstripping detail was changed. [Tr. pp. 322-323.] It was the opinion of Mr. Meyer that the Panador would not have assembled together if these changes had not been made. [Tr. pp. 329-330, 398-399.]

After this testimony was received in evidence, Mr. Grossman again took the stand and categorically stated that he alone was responsible for change in design of the weatherstripping detail. [Tr. pp. 384-386.] Mr. Meyer was then recalled as a witness and explained at length the modifications and changes made by appellee with respect to the design of the weatherstripping detail. [Tr. pp. 392-397.] Documentary evidence supporting the testimony of Mr. Meyer was then received in evidence. [Exs. G, H, I, J and K; Tr. pp. 458-462.]

Mr. Grossman acknowledged that assembly tolerances were necessary for the proper assembly of the Panador [Tr. pp. 122-124, 153], but testified that he did not add tolerances to his original drawing [Ex. 6] because it was customary for the supplier to add them. [Tr. pp. 380-381.] In response to questioning by the trial court, Mr. Meyer pointed out that normal commercial tolerances are usually added by the supplier but that in the case at bar special tolerances which required customer approval were necessary and that these special tolerances were added by appellee. [Tr. pp. 397-398, 319-320, 322.] Mr. Grossman admitted that this was true. [Tr. pp. 381, 384.]

In rebuttal of Mr. Grossman's claim that the Panador was unique and original, appellee introduced much evidence that the component parts of the Panador were similar to the component parts of other sliding glass doors and were similar in both shape and design to hundreds of other extrusions previously manufactured by appellee. [Tr. pp. 20-21, 36-38.] In this connection Mr. Meyer testified that part for part each component of the Panador was similar in shape and design to the components of other doors. [Tr. pp. 325-327.] Even Mr. Grossman admitted, on cross-examination, that each of the parts used in the Panador had been used in other sliding doors [Tr. pp. 150-151] and that the Panador was not so different and novel that it could not be reproduced by a third party "within the time it takes to make the dies." [Tr. p. 155.] Mr. Grossman finally contended that the Panador was unique because of its "ease of assembly in the field." [Tr. p. 153.] In so doing, Mr. Grossman acknowledged the importance of the special tolerances which had been added by appellee.

During the period from April, 1954, through December, 1954, appellant placed orders for aluminum extrusions

with appellee totaling approximately $72,670.00. Final shipment of each of these orders has been made by appellee, the last being made on or about May 31, 1955. [Tr. pp. 13-14, 39-40.]

After the section drawings had been made and the original order for aluminum extrusions had been received, the extrusion drawing was submitted to appellee's Plant Tool and Design Department for the necessary engineering determinations, and draftings were made for the manufacture of the extrusion tools. When the tool design was completed, a tool production order, designated in appellee's plant as a "T" order, was issued releasing the tool design to the Die Manufacturing Department for the manufacture of the die, which required from one to three weeks. Thereafter, the actual manufacture of the extruded shapes was entered into the production schedule of appellee's extrusion mill. [Tr. p. 30.]

Neither when the original drawing was submitted to appellee, nor at any time during the processing of the assembly print and the making of full-scale cross-section drawings of the sliding door, was anything ever stated or said by any representative of appellant that the assembly picture or the design of the door was to be treated as confidential, classified or unique in nature. The order was placed in a routine manner and was processed by appellee in the same routine manner by which it processes thousands of other orders received by it. [Tr. pp. 31, 37.]

After each order for Panador extrusions was placed with appellee, appellee sent appellant a written acknowledgment of the order in the form of Exhibit 2. [Tr. pp. 91-92, 40.] Paragraph 11 of the "Terms and Conditions"

of these acknowledgments is the only writing relating to the production of dies by appellee for appellant. Except under appellant's interpretation of Paragraph 11, there was at no time during the entire negotiations between appellant and appellee for the production of extruded shapes by means of dies to be produced by appellee, any agreement, oral, written or otherwise, that the dies would be used solely or exclusively for the production of extruded shapes for appellant.

It was established by uncontroverted evidence at the trial of this action that when it is necessary for dies to be made to fill an extrusion order, it is the custom and usage in the extrusion industry for the manufacturer of the extrusions to make the dies which will produce the extruded shapes ordered by the buyer. The buyer does not pay for the actual cost of the dies, but rather pays only a service charge, called a "die charge." The dies remain the property of the extrusion manufacturer and in the manufacturer's possession and control at all times, and the buyer acquires only the prior right to have those dies used in the manufacture of extruded shapes when his order is in process. The dies may be used by the extrusion manufacturer at any time on other orders which require identical extrusions so long as by doing so the *use* of the dies on the buyer's order is not in any way hindered or delayed. [Tr. pp. 25-27.]

In the case at bar, appellant did not order dies from appellee. Appellant only ordered aluminum extrusions. The dies were designed, ordered and produced by appellee as part of its internal production method and as a necessary step in the fulfilling of appellant's extrusion order.

[Tr. pp. 39-40.] The actual cost of these dies was $3,176.06 [Tr. p. 343], however, appellee charged appellant and appellant paid only $1,430.00 for the use of these dies. [Tr. pp. 40, 262-263.]

After the production of the extruded shapes above referred to for appellant, appellant produced and placed the "Panador" on the open market for sale to the general public and on exhibit at various trade shows and meetings. [Tr. p. 156.] The door was not patented nor were any of the parts which were used in making the door. [Tr. pp. 141-142, 150.] It was, therefore, in the public domain and could be copied by anyone who wished to do so.

Windsor Manufacturing, Inc., and Windsor Supply, Inc., are two separate corporations, neither of which is a party to this action. While these corporations were not owned by the same person, Mr. C. A. McLin held the controlling interest in both. Windsor Supply, Inc., was in existence first. Subsequently Windsor Manufacturing, Inc., was created, solely as a sales organization to service the accounts of Windsor Supply, Inc., the assembly and manufacturing operations remaining the functions of Windsor Supply, Inc. Thereafter, Windsor Manufacturing, Inc., ceased operations and Windsor Supply, Inc., again took over both the sales and manufacturing operations. [Tr. pp. 183-185, 215, 360.] At the time of the trial of this action, Carl Oldenkamp was the president of Windsor Supply, Inc. [Tr. p. 159.] The changes between these corporations took place during the time period involved in this action, but for convenience the two corporations will be treated as one and will be hereinafter referred to simply as "Windsor" or "Windsor Company."

Appellee's sales organization embraces two divisions, namely, a Parts Division and a General Sales Division. The function of the Parts Division is to promote the sale of both building products and industrial parts. The function of the General Sales Division is to promote the sales of those products generally referred to as mill products as well as consumer sales, such as "Reynolds Wrap." Included in the industrial parts category are basically those items produced from blueprints, drawings or samples according to the customer's specifications, such as washing machine tubs, refrigerator parts, automotive parts, residential window parts, aluminum door parts and the like. Harry M. Sargeant is appellee's Regional General Sales Manager, Parts Division. [Tr. pp. 17-18, 337-338.]

Sometime during September 1954, Mr. Sargeant met with Raymond Gunderson, then president of Windsor, and with C. A. McLin, principal owner of Windsor. At the time of this meeting, Windsor was one of the suppliers of W. P. Fuller Co. for both sliding doors and sliding windows and appellant was one of Fuller's suppliers for both casement and sliding windows. At this meeting Messrs. Gunderson and McLin offered to purchase from appellee different aluminum materials used by Windsor in its manufacture of various products. Included were aluminum extrusions for a door that Windsor was selling to Fuller and aluminum coil stock used in the production of aluminum tile. After some negotiations, it was determined that Windsor, rather than purchasing extruded shapes only, would buy from appellee substantially all of the aluminum components necessary in the production of their sliding door, and that Windsor, using the other

component parts which it had obtained from other sources, such as hardware, bumpers, vinyl weather stripping, rollers and screws, would manufacture and package their own door. It must be emphasized that this meeting was arranged at the request of the Windsor representatives, not appellee, and that the proposals made were initiated by the Windsor representatives, not appellee. [Tr. pp. 18-19, 170.] Contrary to appellant's contention that appellee had maliciously sought to compete with appellant by selling direct to appellant's customer, both Mr. Reznick and Mr. Gunderson testified that the reason Windsor sought to purchase the required components from appellee was that appellant had refused to extend further credit to Windsor or to supply Windsor with additional sliding doors. [Tr. pp. 232, 237-238, 362-363.]

Thereafter, and in order that appellee could furnish price quotations, Windsor submitted to appellee samples of the various products for which Windsor desired extruded shapes. The sliding door that Windsor was supplying to Fuller was not the only sample submitted. Also included were samples of Windsor's tub enclosure, sliding window, shower door and shower enclosure. Price quotations were also requested on aluminum angles and aluminum coil stock. [Ex. 13; Tr. pp. 193-198, 19, 185-186.] Mr. Sargeant then prepared and submitted to Windsor quotations for each component that appellee was to supply, as well as a quotation covering the tooling costs of appellee's Parts Division located in Phoenix, Arizona. [Tr. pp. 19-20.]

After the quotations were submitted to Windsor, it placed an order with appellee for the manufacture of the aluminum components, among which were extrusions for the Windsor sliding door. [Tr. p. 20.] This order was first forwarded to appellee's Parts Division and then, sometime in November 1954, was forwarded to appellee's extrusion mill. The material required by this production

order was to be manufactured under eight new extrusion numbers, numbered 13250 through 13257, inclusive. In the processing of this production order, appellee's Extrusion Engineering Department determined that the sections called for were the same as the sections which had been produced for appellant. Accordingly, and following the normal and customary usage of appellee and of the extrusion industry generally, the existing die tools which were made for appellant under "T" orders numbered 3318 through 3325, and which had been previously used by appellee to produce extruded shapes numbered 10414 through 10421 for appellant, were used by appellee to produce the extrusions called for by the Windsor order. [Tr. pp. 25-27, 32, 40.]

The credit of Windsor was approved by Mr. Miles, appellee's credit manager, in December 1954, on the basis of Windsor's balance sheet dated November 30, 1954, showing a working capital of $80,200.00 and a guarantee received from Associated Finance Company. [Tr. pp. 15-16, 304.] Shipments to Windsor commenced December 17, 1954. [Tr. p. 306.]

The uncontroverted evidence produced at the trial of this case shows that the entire handling of the Windsor order was done by appellee in its usual and customary manner. Throughout each step of the negotiations, the placing of orders, the approval of credit, the determination and production of tooling and dies, the manufacture of the extrusions and the shipment of the finished extrusions, appellee followed not only the custom and usages of the extrusion industry but also the same procedure it had used in processing appellant's own order. At no time did appellee reveal to Windsor any information with respect to the shape or design of appellant's sliding door, appellee's quotations and extrusions having been based on samples and specifications furnished to it by Windsor for a sliding door which had been for sale on the open

market for some months prior to its submission to appellee. [Tr. pp. 20, 30, 36-37, 363.] The extension of credit and the approval of Windsor's orders were done in the normal course of business and as a routine transaction, and were based entirely upon the financial condition of that company and its guarantor. So far as appellee was concerned, the two transactions were completely unrelated, and one had no bearing on the other. [Tr. p. 16.] When appellee ascertained that it had in stock a die which would produce the extrusion ordered by Windsor, appellee used its existing die rather than manufacture a new die to produce an identical shape. In so doing, appellee followed the normal and customary usages of the trade. [Tr. pp. 25-27, 32.] It also must be noted that appellee manufactured more than one set of dies capable of producing the extrusions here involved. [Tr. pp. 354-355.]

During the whole of the period here in question, Windsor Company purchased from appellee the component aluminum extrusions for approximately 5,000 doors [Tr. p. 182], aggregating a dollar value of $155,624.97. [Tr. pp. 168-170.]

With respect to its third alleged cause of action relating to unfair competition, appellant attempted to show that appellee was "competing" with appellant by selling to Windsor Company. In this connection appellant contended that Windsor ordered doors from appellee in substantially the same manner as it would have ordered doors from appellant. [Tr. p. 176.] The testimony of Carl Oldenkamp, a disinterested witness, completely refuted this contention. Mr. Oldenkamp testified that all of the sliding doors purchased by Windsor from appellant were, when received from appellant, "completely marketable, ready to ship items." [Tr. pp. 217-218.] These doors were "knocked-down" (sometimes referred to as a "K D door"), which meant that all the component parts for a door except the glass were packaged together and

ready for sale to a customer. Actual installation of the door was done by the customer in the field. [Tr. p. 219.] On the other hand, appellee at no time ever furnished Windsor with either a knocked-down door, in the sense that it was ready for sale to a customer, or a completed door. Appellee sold to Windsor only a portion of the components used by Windsor in producing a sliding door, *i.e.,* aluminum extrusions. [Tr. pp. 175, 211-212, 219.] The extrusions were strapped together in bundles, each bundle containing similar extrusions, and then shipped to Windsor. [Tr. p. 175.] Some were raw extrusions and some were fabricated in the sense that they had been cut to size, milled and punched with holes. [Tr. pp. 175, 211.]

Mr. Gunderson's testimony confirmed that of Mr. Oldenkamp, *i.e.,* that appellant sold to Windsor a completed knocked-down door ready for sale to Windsor's customers [Tr. pp. 358-359] but that appellee only sold to Windsor the aluminum extrusions necessary to manufacture such a door. [Tr. p. 360.]

Admittedly the extrusions sold to Windsor by appellee were important to the production of the Windsor sliding door, for without them the door could not be produced. Equally important, however, were the dozens of other component parts purchased by Windsor from persons other than appellee. These included dust stops for head, dust stops for sill, metal-back weather seal for the top rails, vinyl-back weather seal for bottom rails and jambs, wheels, axles, corner screws, installation screws, safety bumpers, screws and nuts for safety bumpers, safety bumper spacers, back-up plates, jamb bumpers, jamb bumper screws, adhesive for dust stops, glazing vinyl, latches, keepers, screws for latches and keepers, weatherstripping and the necessary packaging material. [Tr. pp. 181-182.]

These parts were just as essential to Windsor's production of a sliding door as the parts furnished by appellee. [Tr. p. 213.] Unlike the knocked-down doors which were sold to Windsor by appellant in a form ready for sale, Mr. Oldenkamp testified that "considerable work" had to be performed on the extrusions sold to Windsor by appellee before they were ready for sale. In detail he testified that the extrusions had to be separated and identified with rubber stampings, the weather seal installed, the end rails tapped, the wheel carriers installed, the wheels and axles installed in the wheel carriers, the safety and strike bumper assembled, the latch and keeper attached, the dust stops installed, and in some cases the end and bottom rails had to be cut and drilled. Thereafter the parts had to be assembled and packaged. [Tr. pp. 173, 212.]

It is interesting to note that Louis Pinson, appellant's assistant secretary and assistant general manager, in connection with testimony relating to appellant's alleged damage, admitted not only that appellant completely fabricated, assembled and packaged the Panador before selling it [Tr. pp. 265-269], but also that the cost of the auxiliary parts of the door amounted to almost one-half of the cost of the extrusions. [Tr. pp. 265-266.]

Another of appellant's contentions at the trial of this action was that appellee unfairly took Windsor as a customer away from appellant. [Tr. pp. 232-237.] Over objections, Mr. Reznick was allowed to testify to a conversation he had with Mr. McLin in late 1954 for the limited purposes of showing the relationship between appellant and Windsor. [Tr. p. 237.] In this conversation, however, Mr. Reznick stated that Windsor owed appellant $40,000.00 and admitted that he, on behalf of appellant, had refused to sell Windsor any further sliding doors until said sum was paid. [Tr. pp. 232, 237-238.] This was done *prior* to the time that appellee either ap-

proved Windsor's credit [Tr. p. 304], or shipped extrusions to Windsor! [Tr. p. 306.] The testimony of Mr. Gunderson confirmed that Windsor ceased to purchase from appellant not because appellee had solicited Windsor away from appellant but rather because appellant had refused to continue to sell to Windsor. [Tr. pp. 362-363.]

In further support of its claim of unfair competition, appellant sought to establish that during the period Windsor was being supplied with extrusions by appellee, appellant was being shorted by appellee. In this connection, both Mr. Reznick and Mr. Pinson testified that appellant was receiving incomplete and unbalanced shipments. [Tr. pp. 243-245, 259.] On further questioning, however, Mr. Reznick admitted that appellant had *always* had such difficulty in shipments from appellee. [Tr. pp. 244-245.] To substantiate Mr. Pinson's testimony in this regard, appellant introduced in evidence two letters addressed by appellant to appellee in which appellant complained about the unbalanced shipments. [Exs. 22, 23; Tr. pp. 260, 275-276.] As shown by appellant's reply letter [Ex. F; Tr. pp. 298-299] this evidence was insubstantial and appellant has not included them in the record on appeal. Appellee made incomplete shipments to appellant at appellant's own request, and appellee would not have made such shipments except for the fact that it was authorized to do so by appellant. [Tr. pp. 298-299.]

James M. Hairston, the plant controller of appellant's extrusion mill, testified with respect to appellee's production methods and the reasons why incomplete and unbalanced shipments of extrusions occurred. [Tr. pp. 355-356.] Appellee operates its extrusion mill on a job lot cost and production system. When an order is received, a master lot ticket is made identifying the product to be manufactured with the customer's order number. A separate ticket is prepared for each item ordered, and there may, therefore, be several tickets prepared with respect to one order. There also may be several tickets

prepared as to each item ordered because of the total quantity to be produced. The master lot ticket sets forth each step necessary in production and contains all of the instructions with regard to the processes required in each production phase. In short, the master lot ticket represents a schedule of the operations to be performed. Raw aluminum is processed through the mill, inspected, packaged and shipped in accordance with the instructions contained on the master lot ticket. [Tr. pp. 31, 352.]

While it is admitted that appellee's extrusion mill furnished both appellant and Windsor with similar shapes during the first half of 1955 [Tr. pp. 356-357], it is not true that appellee ever diverted extrusions originally produced or in the process of being produced for appellant to either Windsor or any other competitor of appellant. [Tr. pp. 33, 351, 356-357.] Shipments against orders were always made in accordance with the indications on the master lot ticket. Once the raw material is assigned to a lot ticket, it must follow through appellee's normal production operations as set forth in on the lot ticket until it is completed and ready for shipment to the customer. It is virtually impossible to cross-supply once the product has started into production because there are approximately 8000 jobs going through appellee's mill at any given time. The material is processed in batches, and in order to maintain control, it is necessary to keep the batches together. [Tr. p. 352.]

Similarly, the fact that appellee may have accepted an order from Windsor and given it a prior lot number would not meant that there was ever any delay to or interference with subsequent orders received from appellant. [Tr. pp. 33, 352-353.] In the first place, there are at least five

different operations necessary for the manufacture of the extrusions here involved. A prior order would not delay a subsequent order because when the subsequent order was received the prior order would have already passed through one or more of the production steps. The timing of the delivery schedule would not be affected. [Tr. p. 353.] In the second place, appellee had available more than one machine capable of manufacturing any given product [Tr. pp. 353-354], and in particular more than one set of dies used in producing the extrusion components of the sliding door here in question. [Tr. pp. 354-355.]

On the issue of damages, Mr. Reznick testified that in his opinion the sale of extrusions by appellee to Windsor "handicapped" the sales of appellant because he "thought" Windsor would have given appellant an order for 3,000 doors which Windsor had obtained from W. P. Fuller Co. [Tr. pp. 240-242.] On cross-examination, however, both Mr. Reznick and Mr. Grossman admitted that W. P. Fuller Co. had never been a customer of appellant *prior* to appellee's dealings with Windsor. [Tr. pp. 245, 157-158, 359.] Mr. Reznick further admitted that *subsequent* to appellee's dealings with Windsor and at the time of trial, appellant *was* selling direct to W. P. Fuller Co. [Tr. p. 245.]

Appellant called Mr. Pinson to testify with regard to the details of appellant's alleged damage. The speculative nature of the evidence offered on this issue is best shown by a review of the evidence itself. Appellant first introduced a compilation of the production costs incurred by appellant in manufacturing the Panador, which had been prepared under the supervision of Mr. Pinson. [Ex. 24; Tr. pp. 264-265, 333-334.] From this compilation Mr.

Pinson testified that the total cost of producing one Panador was $28.675 [Tr. p. 270]—composed as follows:

Cost of raw extrusions purchased from appellee [Tr. p. 265]	17.80
Cost of auxiliary components purchased for others [Tr. pp. 265-266]	8.145
Cost of labor [Tr. pp. 266-269]	2.36
Cost of packaging [Tr. p. 269]	.37

While this compilation was originally introduced to show appellee's production costs, it was later acknowledged that it was merely an "estimate" of production costs. [Tr. p. 339.] It was also shown that the compilation did not cover all sizes of the door in question [Tr. pp. 270-271] and was not based upon all of the doors produced by appellee but rather was based only on a run of 50 doors manufactured in the fall of 1954. [Tr. pp. 270, 340.]

In rebuttal of the figures offered by appellant, appellee called its plant controller, James M. Hairston, to the stand. Mr. Hairston pointed out not only that the cost data submitted was based on the "direct cost margin approach" which included only material and direct labor costs but also that this approach was not the one customarily used to obtain the cost of a product for profit and loss purposes. [Tr. pp. 341-342.] There was specifically omitted from appellant's cost figures any item for sales expenses [Tr. p. 346], for administrative expenses [Tr. p. 346] and for overhead, such as light, power, indirect labor, miscellaneous supplies, taxes, insurance, employee benefits and the like. [Tr. pp. 341, 346.] Mr. Hairston further testified that the normal method of allocating overhead was by prorating it against sales volume.

After the testimony of Mr. Hairston was received, appellant reopened its case in chief and recalled Mr. Pinson as a witness. The only written data of appellant which was available were summaries of the cost of all products produced by appellant including the Panaview door, the Panaview window and the Panador. [Exs. 26, 27; Tr. pp. 370-373, 390.] Neither of these documents was made as part of a certified audit [Tr. p. 391] and neither has been included in the record on appeal. While Mr. Pinson admitted that no records were available which related only to the Panador (the only product involved in this case), he was allowed to testify that in his "opinion" the cost of tooling for the Panador constituted only 20 per cent of the total cost of tooling and that the sales expense for the Panador constituted only 15 per cent of the total sales expense. [Tr. pp. 365-368.] Mr. Pinson further testified that during the period in question appellant had the plant capacity to produce 5,000 additional Panadors (which was the amount of extrusion parts Windsor had purchased from appellee) [Tr. pp. 273, 377], but that if appellant had manufactured the 5,000 additional Panadors, the overhead of appellant would have been increased by only 2 per cent. [Tr. pp. 377-378.] Mr. Pinson so testified even though, as will subsequently be shown, appellant only produced approximately 6,000 Panadors during the whole of the period in issue.

Appellant's evidence showed that its total sales of the Panador for 1954 amounted to $135,995.24 and that its total sales of the Panador for the period from January through June, 1955, amounted to $266,849.42. [Ex. 25; Tr. pp. 271, 335.] It was stipulated that in 1954 ap-

pellant produced approximately 2,000 Panadors and that from January through June, 1955, appellant produced 4,145 Panadors. [Tr. pp. 335, 336.] It was also stipulated that the average sales price of the Panador in 1954 was $62.00 and in 1955 was $65.00. [Tr. p. 336.]

In summary, the evidence contained in the record of this case shows conclusively that at no time has appellee ever been in the business of manufacturing sliding glass doors and at no time has it ever competed with appellant or any other company in the manufacture and sale of sliding doors. [Tr. pp. 20, 230.] Appellee did not, as is falsely alleged in appellant's third cause of action, unfairly compete with appellant by revealing the design of the Panador to its competitors. [Tr. pp. 20, 26-27, 36-37, 633.] Appellant placed the Panador on the open market for sale to the public long prior to appellee's dealings with Windsor. The Panador was not patented and could be copied by anyone. [Tr. pp. 141-142, 150, 155.]

Nor did appellee, as is also falsely alleged in appellant's third cause of action, unfairly compete with appellant by financing appellant's competitors. In this connection, appellee accepted orders from appellant and approved appellant's credit during the period from April, 1954, through February, 1955. [Tr. pp. 13-14, 39-40.] In April, 1955, appellee declined to extend further credit to appellant because appellant's payment record had been slow and because appellant's balance sheet dated February 28, 1955, showed a deficit working capital position of $61,-631.00. During this period, however, appellee did not hold up shipments on the prior orders submitted by appellant and, in fact, continued to make shipments to appellant on those orders through May, 1955. In addition, appellee offered to extend further credit to appellant whenever their account was paid in full and their financial condition justified it. [Tr. pp. 14-15, 40.] As heretofore pointed out, appellee's approval of Windsor's credit was based solely upon Windsor's financial condition and that of its guarantor. [Tr. pp. 15-16, 304.]

Specific Objections to Appellant's Statement of the Case.

In addition to the inclusion of documents in the record on appeal which were not received in evidence, appellant has incorrectly stated and has distorted many pertinent facts in an attempt to obtain the reversal of the judgment entered below. The most significant of these will be noted here, in the order which they appear in appellant's opening brief.*

1. Appellant States That Its Drawings Were Submitted to Appellee "in Strict Confidence." (A. O. B. p. 2.)

The evidence does not support this statement. Appellee's evidence show that at no time in any stage in the placing of appellant's order was there any indication, suggestion or discussion of any kind that the work being performed for appellant or the designs of such work were of a secret, confidential or unique nature. [Tr. pp. 26, 32, 36.] Appellant's product was neither novel nor patented. [Tr. pp. 20-21, 36-38, 141-142, 150.] By Mr. Grossman's own testimony the *only* conversation that he had with any representative of appellee which in any way related to this matter was the one he had with appellee's salesman, Mr. Kavich. [Tr. p. 158.] On cross-examination, Mr. Grossman admitted that all he told Mr. Kavich was that "Panador" was a new product and that he requested Mr. Kavich not to disclose to competitors the fact that appellee was in the process of producing and would soon market the "Panador." [Tr. p. 156.] Mr. Grossman's request was not that appellee not disclose design information but rather that appellee not disclose the fact that appellant was, in the future, going to put the Panador on the open market. This was done because of the highly competitive nature of the sliding door busi-

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*Hereinafter referred to as A. O. B.

ness. Once the Panador was sold to the public, anyone was free to copy its design since it was not patented. On these facts the trial court correctly found that appellant's allegation that it had submitted the design of the Panador to appellee in trust and confidence [Complaint, Para. VIII; Tr. p. 6] was not true. [FF. Para. V; pp. 59-60.]

2. Appellant States That Windsor's Orders Described the Products to Be Supplied by Appellee as so Many Sets K D Sliding Doors. (A. O. B. p. 4.)

In an attempt to prove that appellee was in competition with appellant, appellant contended that appellee furnished to Windsor substantially the same product that appellant had furnished to Windsor, *i.e.,* knocked down doors ready for resale to customers. As part of its proof in this regard, appellant states that Windsor's orders described the product to be supplied by appellee as so many sets of K D Sliding Doors. (A. O. B. p. 4.) Such is not the fact. The orders themselves show that Windsor only ordered sets of K D Sliding Door *fabricated parts.* [Exs. 11, 12; Tr. pp. 188-192.] These parts were aluminum extrusions which constituted only a portion of the parts necessary to manufacture a sliding door. [Tr. pp. 175, 211-212, 219.] Mr. Oldenkamp testified in detail as to what other parts were necessary and to the fact that these other parts were not purchased from appellee. [Tr. pp. 181-182.] He also testified in detail with respect to the "considerable work" that was done by Windsor before the Windsor door was ready for sale to the public. [Tr. pp. 173, 212.] Mr. Pinson, appellant's assistant general manager, testified that the cost of the auxiliary parts amounted to almost one-half of the cost of the extrusions. [Tr. pp. 265-266.] Moreover, both Mr. Gunderson and Mr. Oldenkamp testified that the product furnished to Windsor by appellant was a finished knocked-down door, for which no additional parts were necessary, on which

no additional work was necessary, and which were completely ready for sale to the public. [Tr. pp. 217-218, 358-359.] This evidence showed conclusively that appellee, in fact, did not compete with appellant.

3. Appellant States That Appellee Sold Parts to Windsor to the Exclusion of Appellant. (A. O. B. p. 5.)

There is no evidence to support this contention. It is admitted that during the first part of 1955, appellee furnished both appellant and Windsor with similar extrusions. It is not true, however, that appellee ever diverted extrusions originally produced or in the process of being produced for appellant either to Windsor or to any other competitor of appellant, and the only evidence in the record so shows. [Tr. pp. 33, 351, 356-357.] It was also proved that the fact that appellee may have accepted an order from Windsor and given it a prior order number would not mean that there was ever any delay to or interference with subsequent orders received from appellant. [Tr. pp. 33, 352-355.] Except for its confusion value, one might well question the purpose of appellant's contention in this connection since it is conceded that the within cause does not seek damages for breach of appellee's agreement to furnish appellant extrusions. [Tr. p. 421.]

4. Appellant States That It Was Receiving Incomplete and Unbalanced Orders Without Its Consent. (A. O. B. pp. 5, 6.)

At the outset one may again question the purpose of appellant's contention, if indeed, not its good faith in making it. Specifically, appellant states that ". . . the internal records of appellee showed that the orders were for component parts of sliding doors which bore the notation: sliding doors, these are component parts so be sure and ship all sections at same time" (A. O. B. p. 5) and that ". . . during the period when appellant was being shipped incomplete and unbalanced orders, letters

were written to appellee protesting such shipments." (A. O. B. p. 5.) While these letters were introduced into evidence [Exs. 22, 23; Tr. pp. 260, 275-276], appellant has not included them in the record on appeal. The reason is obvious: appellant's reply letter [Ex. F; Tr. pp. 298-299] demonstrated that the unbalanced shipments to appellant were made at appellant's request and that appellee would not have made such shipments except for the fact that it was authorized to do so by appellant, yet nowhere in its brief does appellant mention appellee's reply letter.

Moreover, Mr. Hairston, appellee's plant controller, testified with respect to appellee's production methods and the reasons why incomplete and unbalanced shipments of extrusions occurred. [Tr. pp. 31, 352, 355-356.] As Mr. Hairston pointed out, one of the plagues of the extrusion industry is meeting its delivery schedule. During the period involved, appellee was up to only 60 per cent on its delivery schedule. This is perhaps unfortunate, but it is normal. [Tr. pp. 355-356.] Mr. Reznick, moreover, admitted appellant had *always* had such difficulty in shipments from appellee, even before appellee had accepted orders from Windsor. [Tr. pp. 244-245.]

5. Appellant Implies That Windsor Stopped Purchasing From Appellant Because of Some Affirmative Act of Appellee. (A. O. B. p. 6.)

Appellant states that "it was established, and not controverted by appellee, that late in 1954, when appellant was attempting to obtain back payments from Windsor, Mr. McLin, an officer of Windsor, stated that he *had* another source of sliding doors." (A. O. B. p. 6.) The evidence relied upon by appellant is a conversation between Mr. Reznick and Mr. McLin at which no representative of appellee was present. This conversation was hearsay as to appellee, but appellant does not point out that it was admitted, over objection, only for the limited

purpose of showing the relationship of the parties—not to prove the truth of the matter asserted. [Tr. p. 237.]

Mr. Reznick testified to this conversation, and even if it be accepted as proof of the matters asserted, it shows only that Mr. Reznick, on behalf of appellant, had refused to continue to sell sliding doors to Windsor until Windsor paid $40,000.00 which it owed to appellant. When, however, it is realized that this occurred *prior* to the time that appellee either approved Windsor's credit [Tr. p. 304] or shipped extrusions to Windsor [Tr. p. 306], it is clear that Windsor ceased to purchase from appellant, not because appellee had solicited Windsor away from appellant but rather because appellant had refused to continue to sell to Windsor. The testimony of Mr. Gunderson confirmed this fact. [Tr. pp. 262-263.]

6. Appellant Not Only States That Appellee Shifted Its Ground of Defense Several Times but Also Attacks Appellee's Good Faith. (A. O. B. pp. 7-8.)

One of appellant's most insidious insinuations occurs at pages 7 and 8 of its opening brief, where it is stated that appellant shifted its position and defense several times with respect to this case. It is true that appellee's answer denied the use of the dies here in question to produce extrusions for Windsor and that appellee later admitted that it had so used the dies. Appellant, however, has not deemed it proper or necessary to bring the attention of the Court to the explanation of appellee's counsel for such action—an explanation which was made to the trial court before appellee's opening statement and before any evidence was introduced and which was expressly made "so that there would be no misunderstanding" in this regard. [Tr. pp. 82-83.] It is not true, moreover, that appellee ever changed its defense. Appellee has always contended, and still contends, that no contract exists which prevented appellee from using the dies to produce extrusions for Windsor. [Tr. pp. 83-84, 280.]

Summary of the Case.

When the foregoing detailed statement of facts is analyzed, a relatively uncomplicated and simple picture emerges.

Appellant is in the business of manufacturing and selling, among other things, sliding doors and windows. This business is very competitive. Appellee is in the business of producing and selling all types of aluminum products. Appellee's selling function is divided into two separate divisions. The Parts Division sells essentially industrial products and the General Sales Division sells essentially consumer or mill products. The separation of selling functions, however, is not arbitrary, and both divisions are qualified to handle the sale of ordinary type aluminum extrusions such as are involved in this case. On the other hand, appellee's production function is not divided. Its engineering department and extrusion mill handle all orders obtained, whether by the General Sales Division or by the Parts Division.

Early in 1954 appellant determined to produce a sliding glass door which it named "Panador." This door was manufactured by appellant from parts which it obtained from various sources. Negotiations for the aluminum extrusion components of the door were entered into by Mr. Grossman on behalf of appellant and by Mr. Yates on behalf of appellee's General Sales Division. In April appellant submitted drawings for the desired extrusions to appellee. The design of the extrusions was not secret or confidential. The sliding door involved was not unique or novel. It was similar in both shape, design and appearance to several doors already on the market. It was

not patented, and there is no element of "palming off" or confusion in the public mind presented.

Appellee's engineering department thereafter assisted appellant work out the details of design and made drawings for the necessary dies. Appellee then manufactured the necessary dies and produced and sold extrusions to appellant. In addition to the cost of extrusions, appellant paid a die charge for the use of the die. Appellant then combined the extrusions with the other parts it purchased elsewhere and produced a finished sliding door. This it packaged and sold to the public, including Windsor.

Up to this point, the picture was peaceful and serene. Ominous clouds, however, appeared in the latter part of 1954. At this time Windsor became delinquent in its accounts, and appellant refused to continue to sell to Windsor until the account was paid. Windsor would not be forced out of the sliding door business, and so it decided to manufacture its own door.

Negotiations were entered into by Mr. McLin and Mr. Gunderson on behalf of Windsor and by Mr. Sargeant on behalf of appellee's Parts Division. The negotiations were not only for extrusions for a sliding door but also concerned aluminum parts for a shower door, tub enclosure, sliding window and related items. Samples of the parts for all products desired were subsequently submitted to appellee's Parts Division and quotations were in turn submitted to Windsor. When Windsor thereafter placed an order for the aluminum extrusions, the samples were sent to appellee's engineering department to make die drawings. It was then determined that appellee already had on hand dies which would produce the

desired extrusions. These dies were not marked as secret or patented. Appellee's extrusion mill then used the dies, of which it had more than one set, to produce extrusions for Windsor. Windsor took the extrusions and then manufactured its own sliding door, using other components purchased elsewhere.

There is no suggestion in the record of any conspiracy between appellee and Windsor and against appellant. The appellee-appellant transaction was handled by Mr. Grossman for appellant and by Mr. Yates for appellee's General Sales Division. The appellee-Windsor transaction was handled by Messrs. McLin and Gunderson for Windsor and by Mr. Sargeant for appellee's Parts Division. Each transaction was separate and distinct from the other and each was handled by a different division of appellee. It was not until dies were to be produced for Windsor that appellee's engineering department determined that it already had on hand dies which would produce the item ordered by Windsor. At no time did appellee disclose any design information to Windsor.

No question could have been raised if Windsor had originally submitted samples to, say, Alcoa and Alcoa had then reproduced the necessary dies and sold extrusions to Windsor, since the Panador was not patented. Similarly, no question could have been raised if appellee had manufactured another set of dies and used them to produce extrusions for Windsor. [Tr. pp. 415-417.] Appellee didn't do this, and the only question presented is whether appellee had the right to use the dies on Windsor's orders.

It is not contended that appellee violated any custom or usage of the extrusion industry when it used the dies on Windsor's order. The evidence shows that appellee at no time diverted extrusions which it had produced or was in the process of producing from appellant to fulfill the orders of Windsor. The evidence also shows that

the use of the dies on Windsor's orders in no way interfered with or delayed the orders of appellant. The only question then presented is whether appellee violated any contract in so using the dies. The only writing relevant to this question is paragraph 11 contained in Exhibit 2. [Tr. pp. 91-92.] When further narrowed, the critical issue becomes the applicability and interpretation of paragraph 11. The trial court, after considering all the evidence, agreed with appellee and found that this paragraph had no application to the facts presented by the case at bar. This decision has ample support in the record.

Summary of Argument.

The argument of appellee is three-fold. The first point made is that appellant has attempted to confuse the issue before this Court by using such terms as "confidential relation" and "breach of good faith," when in truth the only question to be determined is the applicability of Paragraph 11. Appellee's second point deals in turn with each of the allegations in appellant's Complaint, the trial court's findings with respect to each allegation, and the evidence supporting each of the findings. The final portion of appellee's argument meets and answers separately each of the seven arguments made by appellant for reversal of the District Court's judgment. Appellee's points are entitled as follows:

1. The only substantial question involved is whether a contract exists pursuant to which appellee agreed to construct dies solely and exclusively for appellant's use.

2. The findings of fact with respect to the issues involved are sufficient and are supported by the evidence.

3. Appellant's arguments for reversal of the judgment of the trial court have no factual or legal basis.

ARGUMENT.

I.

The Only Substantial Question Involved Is Whether a Contract Exists Pursuant to Which Appellee Agreed to Construct Dies Solely and Exclusively for Appellant's Use.

Throughout the pleadings, trial and argument of this case, appellant has talked in terms of "breach of confidential relation," "breach of good faith," "breach of trust and confidence," "fiduciary relationship," "unfair competition" and the like. The use of these terms serves no useful purpose. They only confuse and cloud the real issue involved.

In this case one must cut through the wall of words erected by appellant and look for the act of appellee which is alleged to be wrongful. When this is done, one finds all of appellant's alleged causes of action depend upon whether a contract existed pursuant to which appellee agreed to construct dies solely and exclusively for appellant's use or, to put it another way, whether appellee was prevented under the terms of a contract from making use of the dies for any purpose other than the production of extrusions for appellant's order. If such contract existed, appellee must live with it for appellee did at one time use the dies to produce extrusions for Windsor without the consent of appellant. If, however, no such contract existed, appellant could not have breached it, there would be no "breach of a confidential relation," there would be no "unfair competition," and each of appellant's alleged causes of action would fail. It is interesting to note that under astute questioning by the trial court, appellant acknowledged that its right to relief depended on whether appellee wrongfully used the dies involved and that this in turn depended on whether a contract for their exclusive use existed. [Tr. pp. 72-74, 81.]

II.

The Findings of Fact With Respect to the Issues Involved Are Sufficient and Are Supported by the Evidence.

Appellant's attack upon the judgment of the trial court is basically upon the findings of fact and the supporting evidence. Much of its brief is devoted to argument of the evidence and the inferences to be drawn therefrom. More difficult to deal with is the fact that appellant has stated that to be true which is not supported by the evidence or which has been specifically found to be untrue by the trial court. Appellant's attack in this connection must fail. The findings of fact made by the trial court are both sufficient and supported by the evidence.

A. A Judgment Will Not Be Reversed on the Ground That the Evidence Is Insufficient to Support the Findings Where There Is Substantial Evidence in the Record.

The rules of law with respect to the review of the evidence by the appellate court are well established and need but brief reference. Where there is substantial evidence supporting the determination of the trier of fact, the appellate court will not reverse the judgment on the ground that the evidence does not support the findings of fact.

Nichols v. J. J. Newberry Co., 150 F. 2d 15 (9th Cir., 1945);

Super Mold Corp. of California v. Bacon, 130 F. 2d 860 (9th Cir., 1942).

On appeal, the evidence will be viewed in the light most favorable to the party who prevailed below and every reasonable inference will be made in favor of the findings of the trial court.

Pasadena Research Laboratories v. United States, 169 F. 2d 375, 380 (9th Cir., 1948);

United States v. Aspinwall, 96 F. 2d 867 (9th Cir., 1938);

Inland Power & Light Co. v. Grieger, 91 F. 2d 811 (9th Cir., 1937).

As was stated in *Ross v. British Yukon Navigation Co.,* 188 F. 2d 779 (9th Cir., 1951) at page 782:

> "We must assume that all conflicts in the evidence were resolved against appellants and in considering the question of sufficiency of the evidence to sustain the verdict we look to the view thereof which is most favorable to appellee and we are obliged to accept as established all facts which have reasonable support in the evidence. Appellee is entitled to all inferences which may be reasonably drawn from the circumstances in evidence."

Equally established is the rule that the appellate court will not weigh the evidence. Questions of credibility are for the trial court.

Adolfson v. United States, 159 F. 2d 883 (9th Cir., 1947);

Suetter v. United States, 140 F. 2d 103 (9th Cir., 1944).

In the case at bar, the trial court specifically found that the only writing involved did not apply to the facts of this case and that appellee had at no time agreed to keep the dies for appellant's sole and exclusive use. [FF. Par. II; Tr. p. 58.] As will be shown subsequently, this finding is abundantly supported by the record.

B. There Is Substantial Evidence to Support Each of the Findings Made by the Trial Court.

There is substantial evidence in the record on appeal supporting each of the findings of fact made by the trial court. For convenience and orderly analysis, appellee will refer separately to each of appellant's alleged causes of action, the evidence bearing thereon and the findings made by the trial court.

1. Breach of Contract—Appellant's First Alleged Cause of Action.

Appellant's first alleged cause of action is for breach of contract [Tr. pp. 3-6], and the material allegations are:

a. Appellee agreed to make and keep dies for appellant's sole and exclusive use.

b. Appellee breached this contract by using the dies to make extrusions for Windsor without appellant's consent.

c. By reason thereof, appellant's competitors were able (1) to divert business from appellant, (2) to confuse the buying public as to the source of the doors, and (3) to use extrusions diverted from appellant.

It should be noted that in appellant's second alleged cause of action, it is alleged that there was a universal custom in the aluminum extrusion industry that dies paid for by one customer must be used only for that customer's order. [Complaint, Par. IX; Tr. pp. 6-7.] Appellant abandoned this contention at trial and offered no evidence in its support. [Tr. pp. 294-295.] Appellant's only claim to relief, therefore, depends upon whether a contract existed reserving the sole and exclusive use of the dies to appellant.

The trial court found that none of the allegations of appellant's first alleged cause of action were true except that appellee at one time used the dies to produce extrusions for Windsor without appellant's consent. [FF. Pars. II, III, IV; Tr. pp. 58-59.]

Taking the evidence with respect to appellant's alleged damage, it is clear that findings are supported by the evidence. In the first place, it is not true that by reason of appellee's acts, appellant's competitors were able to confuse the buying public as to the source of the doors. No evidence was introduced in support of this contention, and, in fact, appellant conceded no less than five times at the trial of this action that no element of "palming off," secondary meaning or confusion in the public mind entered into this case. [Tr. pp. 69, 73, 78, 422, 425.] In the second place, it is not true that by reason of appellee's acts, appellant's competitors were able to divert business from appellant. Except for Mr. Reznick's testimony that the sale of extrusions by appellee to Windsor "handicapped" the sales of appellant because he "thought" Windsor would have given appellant an order for 3,000 doors, no evidence was offered in support of this contention. On the other hand, both Mr. Reznick's testimony [Tr. pp. 232, 237-238] and Mr. Gunderson's testimony [Tr. pp. 362-363] demonstrated that the only reason Windsor stopped ordering from appellant was that appellant, for credit reasons, refused to continue to sell to Windsor. This was done prior to the time appellee either approved Windsor's credit [Tr. p. 304] or shipped extrusions to Windsor. [Tr. p. 306.] Finally, the evidence supports the finding that appellee did not divert extrusions originally produced or in the process of being produced for appellant to either Windsor or any other competitor of appellant. [Tr. pp. 33, 351, 356-357.]

It is equally clear that the evidence supports the finding that no contract between appellant and appellee existed

pursuant to which appellee agreed to make and keep the dies for appellant's sole and exclusive use. It is conceded by all that the only writing which in any way pertains to the use of the dies in this transaction is paragraph 11 contained in Exhibit 2. [Tr. pp. 91-92.] This document is an acknowledgment of the order appellant placed with appellee. Paragraph 11 provides as follows:

> "11. EQUIPMENT: Any equipment (including jigs, printing plates or cylinders, dies and tools, etc.) which Seller constructs or acquires specifically and solely for use on Buyer's order shall be and remain Seller's property and in Seller's sole possession and control. Any charges made by Seller therefor shall be for the use of such equipment only. When Seller has not accepted orders from Buyer for product to be made with such equipment for a period of one year, Seller may then require Buyer to give disposition of the said equipment, and in the event such disposition is not given within thirty (30) days after such demand, Seller may without liability make such disposition as it sees fit or may store the equipment for the account of Buyer, charging Buyer for the storage charges."

Appellee contends, and contended at trial [Tr. pp. 83-84], that this does not constitute a contract to construct and keep dies solely and exclusively for appellant's order. In agreeing with appellee, the trial court considered the following facts and circumstances.

a. *Appellee's Acts Did Not Violate Any Custom or Usage of the Trade.*

In its complaint appellant alleged that there was a universal custom in the aluminum extrusion industry that the supplier of extrusions must use dies paid for by one customer only for that customer's order. [Complaint, Par. IX; Tr. pp. 6-7.] At the trial appellant completely

withdrew this contention and offered no evidence in its support. [Tr. pp. 294-295.] In so doing, appellant conceded that appellee violated no custom or usage of the trade by using the dies to produce extrusions for Windsor. Moreover, the only evidence in the record establishes that it was the custom in the industry (a) that the supplier of extrusions would manufacture the dies used in producing the extrusions ordered, (b) that title to the dies remained in the supplier, (c) that the buyer paid only a "die charge" for the use of the dies and (d) that the supplier was free to use the dies on anyone's order so long as there was no interference with the original buyer's orders. [Tr. pp. 25-27, 32.]

The evidence supports the trial court's implied, if not express, finding that appellee's use of the dies to produce extrusions for Windsor did not in any way interfere with or delay the orders of appellant. [Tr. pp. 33, 352-355.]

b. *The Language of Paragraph 11 Is Merely Conditional.*

Appellant contends that the first sentence of paragraph 11 constitutes a contract and firm commitment on the part of appellee to use the dies which it manufactured to produce appellant's extrusions solely on appellant's orders and for no other customer. A plain reading of this sentence, however, demonstrates that this is not the purpose or intent of the words used and is a strained and unreasonable construction of Paragraph 11.

Appellee submits that Paragraph 11 is not mandatory. It may or may not apply to any particular order. If the product to be produced from the die is a standard product which can be used freely by anyone, Paragraph 11 has no application. In such case there is no question with respect to who owns the die or to whether the extruder may use the die on anyone's order. The custom of the industry dictates that the extruder owns the die and that

the buyer merely pays a die charge for their use. On the other hand, if the product to be produced from the die is patented, for example, it is clear that the extruder cannot use the die except on the orders of the one who owns the patent. In such case Paragraph 11 applies and makes it clear that the die constructed by appellee nevertheless remains the property of appellee and that the Buyer still only pays for the use of the die.

The word "any," in its adjective sense, means "some," "at all," "in any degree," "to any extent" or "one out of several or many." (3 C. J. S. 1398, *et seq.*) When modified by the word "which," it is quite apparent that the paragraph above referred to is intended to mean that *if* Seller constructed any dies which were to be used specifically and solely on Buyer's order, then and in such event they would still remain Seller's property and be in Seller's possession and control. It does not mean that *every* die which Seller constructed for use on Buyer's order should be deemed to have been constructed solely for Buyer's use.

Bates v. McHenry, 123 Cal. App. 81, 86 (1932);

Loyalton Electric Light Co. v. California Pine Box & Lumber Co., 22 Cal. App. 75 (1913).

The word "any," used in its adjective sense, followed by the word "which," obviously means that there may be *some* dies that are constructed only for one Buyer's use. It does not mean, however, that *all* dies constructed by Seller are necessarily for the sole use of Buyer. By Paragraph 11 appellee merely protected itself with regard to those situations where it is clear that the dies, by the very nature of things, must be used solely and exclusively on a given customer's order, in which case appellee reserved to itself the property right in and possession and control of the dies.

There are situations in the production of aluminum extrusions, as the testimony in this case shows, where the extruding company must necessarily use the dies which it manufactures to produce extrusions for a given customer solely on that customer's order, *i.e.*, where the dies are used to make classified or secret military products, patented products or highly specialized, technical or unique equipment. [Tr. p. 26.] This is not the case with the orders which were placed by appellant, such orders having been placed in the ordinary manner and in the usual routine of appellee's business. [Tr. pp. 16, 20, 33, 36-37.] The products were clearly not for military use, and it was stipulated that they were not patented. [Tr. pp. 141-142, 150.] At no time was there any indication, suggestion or discussion that the work being performed for appellant or the designs of such work were of a secret, confidential or unique nature. [Tr. pp. 26, 32, 36.] The extrusions produced were similar in both shape and design to the components of other doors [Tr. pp. 36-38, 325-327] and to hundreds of other extrusions previously manufactured by appellee. [Tr. pp. 20-21, 36-38.] In addition the trial court had a model of the door before it from which it was clear that it was nothing more than a standard sliding door. [Ex. 7; Tr. p. 125.]

On these facts, the trial court very correctly found that it ". . . is not true . . . that the dies in controversy were constructed 'solely for use on buyer's order' within the meaning of Paragraph 11 . . . nor is it true that (appellee) at any time agreed to keep such dies for (appellant's) sole and exclusive use." [Tr. p. 58.]

c. *Appellant's Own Evidence Substantiated the Trial Court's Interpretation of Paragraph 11.*

Prior to the time appellant ordered extrusions from appellee, appellee had done business with a corporation called Glide Windows, Inc. While Messrs. Grossman and

Reznick were officers in the Glide corporation, Glide is not a party to this action or in anyway connected with it. Nevertheless, Mr. Grossman was allowed to testify over objection that in 1948 (6 years before appellant dealt with appellee) a representative of appellee told him that dies used to produce sliding window extrusions would be for the exclusive use of Glide Windows, Inc. [Tr. pp. 99-101, 136-137.] This testimony proved to be of utterly no value to appellant, however, for two reasons.

In the first place, appellee's dealings with Glide cannot in anyway be held binding upon appellee in its dealings with appellant. Appellant and Glide are two separate corporations and must be treated as such. In the second place, the acknowledgment appellee sent Glide was worded entirely differently than the one used in the case at bar. [Ex. 5; Tr. pp. 108-110A.] The pertinent paragraph of that acknowledgment is paragraph 12 which reads as follows:

> "*Equipment*: Any equipment (including jigs, printing plates or cylinders, dies and tools, but excluding patterns) which Seller constructs, or acquires specifically for use on Buyer's order shall be and remain Seller's property and in Seller's sole possession and control, and any charges made by Seller therefor shall be for the use of such equipment only. All such equipment will be used exclusively for the manufacture of products for Buyer. . . ."

The language used here is completely unlike that used in paragraph 11, for, as is obvious, the whole sentence is omitted in paragraph 11 which reads: "All such equipment will be used exclusively for the manufacture of products for buyer." In the second sentence of paragraph 12, the words "such equipment" refer to that equipment, if any, which is constructed "*specifically* for use on Buyer's

order." This sentence makes it clear that dies constructed specifically for use on buyer's order cannot be used to make products to fulfill another's order. If the words used in paragraph 12 had been used in the acknowledgment appellee sent to appellant, appellant would be correct in asserting that appellee breached its contract in using the dies to make extrusions for Windsor since it is conceded that the dies were made "specifically" for use on appellant's order. [Tr. p. 430.]

Compare again the wording of paragraph 11. It states, in effect, that *if* any equipment is constructed "specifically and solely" for use on buyer's order, it shall nevertheless remain the property of the Seller. This paragraph does not say that *all* equipment is, as a matter of fact, deemed to be constructed specifically and solely for use on buyer's order. Appellee submits that the evidence fully supports the trial court's finding that the dies appellee constructed were not made "solely" for use on appellant's order. They were not of a secret or confidential nature. They were not patented, and they were not technical or unique in either design, shape or appearance. Appellee was therefore free to use them to produce extrusions for Windsor or anyone else, so long as appellant's production use was not interfered with.

d. *Appellant Paid Only a Die Charge for the Use of the Dies.*

Appellant contends that if Paragraph 11 does not apply, then appellant must have purchased the dies and is, therefore, the owner of them and entitled to their exclusive use. Appellant contends that Paragraph 11 is the only writing involved and that if it does not apply, there is no basis for the trial court's finding that appellee owns the dies. There are several answers to this contention. In the first place, the argument ignores the established

custom in the extrusion industry which provides that the supplier manufactures the dies and, *in the absence of contract to the contrary,* retains title to them, the buyer only acquiring the right to their prior use. [Tr. pp. 25-27, 32.] In the second place, the evidence does not support appellant's contention that it purchased the dies. In fact, it demonstrates that appellant merely paid a die charge for the *use* of the dies. The uncontradicted evidence in this respect shows that appellant paid only $1,430.00 [Tr. pp. 40, 262-263] even though the dies cost over twice that much to produce, *i.e.,* $3,176.00. [Tr. p. 343.] Moreover, the amount paid by appellant was specifically referred to as a "die charge" in the original order given appellee. [Ex. 21; Tr. pp. 254-255.] It was also shown that appellant paid no sales tax on the dies. [Ex. 21; Tr. pp. 254-255, 434.] Furthermore, appellee manufactured more than one set of dies for use on appellant's order. [Tr. pp. 354-355.] This was done as a part of appellee's internal production method and as a necessary step in fulfilling appellant's extrusion order. Finally, appellant only ordered from appellee aluminum extrusions, not dies. [Ex. 2; Tr. pp. 91-92, 39-40.]

On these facts, it was quite clear to the court below that neither party intended title to the dies to pass to appellant and that both paries understood and intended that the amount paid appellee with respect to the dies was only a service charge for their use. The court so found [Tr. p. 58] and the record supports this finding.

In summary, appellee submits that Paragraph 11 does not constitute a contract for the sole and exclusive use of the dies for appellant. It merely refers to any equipment *which* is constructed or acquired specifically and solely for use on buyer's order and provides for appellee's ownership of such equipment in such case. It does not purport to say that equipment *has been* constructed or

acquired specifically and solely for use on buyer's order. It provides for that possibility but does not go further. Language of a contract must be given effect according to its obvious meaning without implication of provisions not included.

The trial court's interpretation of Paragraph 11 is binding on this Court. It is now well established, in this connection, that where the trier of fact has interpreted a contract in the light of extrinsic evidence, the interpretation made is conclusive on appeal.

Estate of Rule, 25 Cal. 2d 1, 11 (1944);

Transportation Guar. Co. v. Jellins, 29 Cal. 2d 242, 254 (1946);

Jordan v. Reynolds, 97 Cal. App. 2d 194, 197 (1950).

2. Breach of Confidential Relation—Appellant's Second Alleged Cause of Action.

The material allegations of appellant's second alleged cause of action are.

a. Appellant conceived and designed a sliding door.

b. Appellant submitted the design, in the form of drawings, to appellee in trust and confidence.

c. Appellee violated the trust and confidence by using the information and drawings to produce extrusions for appellant's competitors.

There has been omitted from the above list the allegations concerning the existence of a universal custom in the aluminum extrusion industry that the supplier of extrusions must keep confidential all information disclosed to it by its customers [Complaint, Par. IX; Tr. pp. 6-7] because, as noted above, appellant withdrew its contention in this regard at the time of trial. [Tr. pp. 294-295.]

The trial court found that it was true that appellant conceived and designed a sliding door and that appellant submitted the same to appellee in the form of drawings. However, the trial court found that it was not true that the drawings were submitted in trust and confidence and that it was not true that appellee used the drawings and information to produce extrusions for appellant's competitors. [FF. Par. V; Tr. pp. 59-60.] Again, these findings have substantial support in the record.

With respect to the submission of the drawings in confidence, the evidence adduced by appellee showed that at no time in the placing of appellant's order was there any indication, suggestion or discussion of any kind that the work being performed for appellant or the designs of such work were of a secret, confidential or unique nature. [Tr. pp. 26, 31, 32, 36, 37.] The only evidence submitted by appellant was the testimony of Mr. Grossman to a conversation he had with appellee's salesman, Mr. Kavich, at the time the drawings were submitted to appellee. [Tr. p. 158.] On cross-examination, Mr. Grossman admitted that all he told Mr. Kavich was that the Panador was a new product and that he didn't want Mr. Kavich personally to disclose to appellant's competitors the fact that appellant was coming out on the market with it—not that the design information was confidential. [Tr. p. 156.]

The Panador was not patented nor were any of the parts used in making it. [Tr. pp. 141-142, 150.] Once it was sold on the open market, it was in the public domain and could be copied by anyone who wished to do so. Moreover, there was not even anything unique in the sliding door or its component aluminum extrusions. [Tr. pp. 20-21, 37.] It was similar in both design, manufacture, shape and appearance to many other sliding doors already on the market. [Tr. pp. 36-38, 325-327.] This evidence

fully justified the trial court's finding that the drawings were not submitted to appellee in trust and confidence and were not of a confidential nature.

The evidence also supports the finding that appellee did not use the drawings or information to produce extrusions for appellant's competitors. There is absolutely no evidence in the record to the contrary. The undisputed evidence shows that Windsor initiated negotiations with appellee for the purchase of numerous aluminum products, among which were extrusions for a sliding door, a sliding window, and a shower door. [Tr. pp. 18-19, 170, 185-186 and Ex. 13, pp. 193-198.] As is normal in the extrusion industry, the design of the extrusions for the sliding door which Windsor desired were submitted to appellee by sample. Windsor had obtained the design from sources other than appellee and submitted the same to appellee. Appellee did not submit the design to Windsor. Thereafter, appellee submitted quotations on all of the products wanted by Windsor and there followed an order from Windsor for, among other things, extrusions for a sliding door. [Tr. pp. 19-20.] It was not until after this that appellee's engineering department discovered that appellee already owned dies which would produce the desired extrusions. [Tr. p. 32.] It should also be noted that Mr. Sargeant, appellee's Regional Sales Manager, Parts Division, conducted the negotiations with Windsor but had no connection or dealings with appellant. [Tr. p. 18.]

The uncontroverted evidence further shows that appellee did not reveal to Windsor, at any time, any information with respect to the shape or design of appellant's sliding door, appellee's quotations and extrusions having been based upon samples and specifications furnished to it by Windsor for a sliding door which had been for sale on the open market for some months prior to its submission to appellee. [Tr. pp. 20, 33, 36-37, 363.]

The only act done by appellee was that of using its existing dies to produce extrusions for Windsor. In so doing appellee followed its usual procedure and the normal and customary usages of the trade. [Tr. pp. 25-27, 32.] Appellee's action was not tantamount to a disclosure of appellant's drawings and information or "breach of a confidential relation," and indeed, was not wrongful unless there existed a contract for appellant's exclusive use of the dies.

3. Unfair Competition—Appellant's Third Alleged Cause of Action.

Appellant's third alleged cause of action is for unfair competition [Tr. pp. 7-8] and the material allegations are that appellee unfairly competed with appellant by:

a. Making and selling extrusions from the dies paid for by appellant.

b. Revealing the design of appellant's door to appellant's competitors.

c. Financing appellant's competitors by advancing them credit.

The trial court found that none of these allegations were true. [FF. Para. VI; Tr. p. 60.] Again, these findings have substantial support in the evidence. The first two allegations are but repetitions of the contentions made by appellant in its first and second alleged causes of actions, except that they now are classified as "unfair competition." As such they deserve no further consideration, having already been met and answered.

The finding that appellee did not unfairly compete with appellant by financing appellant's competitors has a firm foundation both in law and fact. It needs no citation of authority to establish that public policy fosters free competition. Merely financing another's competitor, obviously, does not constitute unfair competition else no sup-

plier, wholesaler or bank would be in business today. This demonstrates also that appellant's alleged grievance depends ultimately upon a contract for the exclusive and sole use of the dies—not a strained concept of unfair competition.

Be that as it may, the evidence before the trial court shows that there was nothing unfair in the manner appellee extended credit to Windsor. Appellee handed Windsor's account in its usual and normal manner, without regard either for or against appellant. Appellee accepted orders from appellant and approved appellant's credit during the period from April, 1954, through February, 1955. [Tr. pp. 13-14, 39-40.] In April, 1955, appellee declined to extend further credit to appellant because appellant's payment record had been slow and because appellant's balance sheet dated February 28, 1955, showed a deficit working capital position of $61,631.00. During this period, however, appellee did not hold up shipments on prior orders submitted by appellant and, in fact, continued to make shipments to appellant on those orders through May 1955. In addition, appellee offered to extend further credit to appellant whenever its account was paid in full and its financial condition justified it. [Tr. pp. 14-15, 40.]

The credit of Windsor was approved by Mr. Miles, appellee's credit manager, in December, 1954, on the basis of Windsor's balance sheet dated November 30, 1954, showing a working capital of $80,200.00 and a guarantee received from Associated Finance Company. The extension of this credit and the approval of Windsor's orders were done in the normal course of business and as a routine transaction. It was based solely upon the financial condition of Windsor and that of its guarantor. The uncontroverted testimony shows that so far as appellee was concerned, the two transactions were completely unrelated, and one had no bearing on the other. [Tr. pp. 15-16, 304.]

The more exacting question with respect to appellant's alleged cause of action for unfair competition is whether appellee in fact "competed" with appellant, it having been stipulated that no element of palming-off, secondary meaning or confusion in the public mind entered into this case. [Tr. pp. 69, 73, 78, 422, 425.] Even the most cursory review of the record demonstrates that the evidence supports the trial court's finding in this regard, *i.e.,* that appellee did not compete with appellant.

To begin with, it must be again pointed out that the necessity of reaching this issue arises only because appellant has classified appellee's alleged acts as "unfair competition" even though the only act in question is the use of the dies to make extrusions for Windsor. As in the case of financing another's competitor, merely supplying extrusions to another's competitor does not and could not constitute unfair competition. If it did, there would be no such thing as a wholesaler in our economy. Thus, we must again return to the fact that appellee used the same dies to supply extrusions to appellant as it did to supply extrusions to Windsor, and ask whether this was wrong. As heretofore stated, appellee believes that the answer depends upon the law of contracts—not upon the concept of "unfair competition." Since, however, appellant has raised the issue, appellee is compelled to call the court's attention to the evidence supporting the trial court's finding that appellee did not "compete" with appellant either fairly or unfairly.

In the court below appellant contended that Windsor ordered *doors* from appellee in substantially the same manner as it would have ordered doors from appellant. [Tr. p. 176.] The testimony of Mr. Oldenkamp and Mr. Gunderson, both disinterested witnesses, completely refuted this contention. Both witnesses testified that the product Windsor purchased from appellant were assembled doors, received as "completely marketable, ready

to ship items." [Tr. pp. 217, 218, 358-359.] These doors were "knocked down," which meant that all the component parts had been fabricated and packaged together for sale to the public. Windsor only had to put its label on the package and then sell it. [Tr. p. 359.]

On the other hand, the uncontroverted evidence shows that appellee supplied Windsor with only a portion of the components used by Windsor in producing a sliding door, *i.e.,* aluminum extrusions. [Tr. pp. 175, 211-212, 219, 360.] Mr. Oldenkamp testified in detail not only with respect to all of other component parts Windsor purchased from others [Tr. pp. 181-182] (which appellant's evidence showed cost almost one-half the cost of the extrusions [Tr. pp. 265-266]) but also with respect to the "considerable work" which had to be done by Windsor in manufacturing a door before it could be sold. [Tr. pp. 173, 212.]

On this evidence it was abundantly clear to the trial court that appellee was not in competition with appellant. Indeed, what it showed was that Windsor, not appellee, was in competition with appellant. The reason Windsor decided to compete with appellant by manufacturing its own doors is also clear from the record: Appellant had refused to continue to sell doors to Windsor because of unpaid accounts Windsor owed appellant. [Tr. pp. 362-363.]

In summary, appellee submits that the findings of fact made by the trial court are not only sufficient but also supported by substantial evidence. Accordingly, the judgment entered below should be affirmed.

III.

Appellant's Arguments for Reversal of the Judgment of the Trial Court Have No Factual or Legal Basis.

In support of its appeal, appellant makes two arguments with respect to its breach of contract cause of action and five arguments with respect to its "breach of confidential relation" and "unfair competition" causes of action. (A. O. B. p. 9.) None of these arguments are meritorious, either in fact or law. To demonstrate their lack of merit, appellee will consider each in turn even though repetition of some of the points already made by appellee may be necessary.

A.

Appellant's First Argument for Reversal Is That: The Printed Paragraph Providing for a Die Charge for Dies Constructed Specifically and Solely for Appellant Clearly Applied to the Die Charges Listed Elsewhere in the Contract. (A. O. B. p. 10.)

The first argument of appellant deals with its cause of action for breach of contract and in particular with the interpretation and application to be given to Paragraph 11. In partial answer to this argument, appellee refers the Court to appellee's point designated in this brief as "II.B.1" and in particular to subsections "a", "b", "c" and "d" thereof.

Much of appellant's first argument is devoted to stating the rules of law applicable to the interpretation of contracts. With these rules appellee has no quarrel. With the result to be reached in their application, however,

appellee takes issue. In substance, appellant's argument is as follows:

a. The amount paid by appellant for dies is described as a "die charge."

b. Paragraph 11 is the only provision referring to charges for dies.

c. Paragraph 11 only applies if dies are made "specifically and solely" for use on buyer's order.

d. Therefore, dies must have been made "specifically and solely" for use on appellant's order.

Appellee can only agree with the three premises used in this argument. Each taken alone is true. When taken together, however, they assume that which is yet to be determined and thereby beg the question. The conclusion reached, consequently, is an error in logic.

The question in issue is the meaning of Paragraph 11. The first sentence reads: "Any . . . dies . . . *which* Seller constructs . . . specifically and solely for use on Buyer's order shall . . . remain Seller's property . . ." The question then beocmes: Were the dies here involved constructed "specifically and solely" for use on appellant's order? The second sentence of Paragraph 11 does not help answer this question. It reads: "Any charges made by the Seller *therefore* shall be for the use of such (dies) only." The word "therefore" refers to "any dies *which* Seller constructs specifically and solely for use on Buyer's order." The question consequently remains: Were the dies here involved constructed "specifically and solely" for use on appellant's order?

Admittedly the dies were made specifically for appellant. Such was admitted at the trial. [Tr. p. 430.] However, it was not admitted that the dies were made "solely" for use on appellant's order. After hearing all the evidence, the trial court found that the dies were not made solely for use on appellant's order. [Tr. p. 58.] This finding is supported by the evidence, as has heretofore been pointed out in Part II.B.1. of this brief.

B.

Appellant's Second Argument for Reversal Is That: If Ambiguous, the Contract, Drafted by Appellee, Should Be Construed in Favor of Appellant. (A. O. B. p. 15.)

Appellant's second argument also deals with its cause of action for breach of contracts and, again, with the applicability of Paragraph 11. This argument is the most difficult to answer—not because of its merit but rather because of appellant's insistence upon the inference, the half-truth and that which is not in the record. Almost every sentence of appellant's second argument requires careful attention else that which is not true may pass for that which is.

Before considering the detail of this argument, however, the question must be asked: What is appellant's second argument? In doubting the ambiguity of Paragraph 11, appellant at one point states: "It is submitted that such parole evidence would be admissible only if the contract is ambiguous or uncertain." (A. O. B. p. 15.) This statement is made to serve the interest of appellant as it appears at page 15 of appellant's brief. The exact contrary position, however, is taken in the footnote of appellant's brief at page 22 where appel-

lant's interest has apparently changed. Notwithstanding appellant's inconsistent position, appellee submits that the evidence admitted by the trial court concerning the surrounding circumstances was not only admissible in determining the meaning and application of paragraph 11,

Wachs v. Wachs, 11 Cal. 2d 322 (1938);

Walsh v. Walsh, 18 Cal. 2d 439 (1941);

Gibson v. De La Salle Institute, 66 Cal. App. 2d 609 (1944).

but also to identify the subject matter of Paragraph 11.

Lewis Publishing Co. v. Henderson, 103 Cal. App. 425 (1930).

Appellant also apparently contends that if Paragraph 11 is ambiguous it must, as a matter of law, be construed in favor of appellant. (A. O. B. pp. 15-16.) In support of this contention, appellant cites only Civil Code, Section 1654. The case law, as well as the very words of the statute itself, however, shows that Civil Code, Section 1654, is not mandatory—it is simply an aid to construction.

Decter v. Stevenson Properties, Inc., 39 Cal. 2d 407, 418 (1951);

Hogue v. Ford, 44 Cal. 2d 706, 711 (1955).

The real aim of appellant's second argument is found in the last sentence of the argument. (A. O. B. p. 25.) Appellant is arguing nothing more nor less than that the evidence does not support the trial court's findings that (1) appellant only paid a service fee for the use of the dies and (2) the dies were not made solely for appellant's use. The evidence relied upon by appellant will be considered in order.

1. Judicial Admissions. (A. O. B. pp. 17-19.)

In arguing the evidence, appellant begins by referring to what are termed "judicial admissions." Here appellant relies most heavily upon the inference and that which is not in the record. Appellant first refers to statements of Messrs. Duque and Lydick which are not in evidence and to a portion of the affidavit of Mr. Yates. Appellant contends that these so-called "judicial admissions" demonstrate that appellee relies on Paragraph 11 to give it the property rights in the dies. Such is not the case. Appellee's argument at trial was two-fold. Appellee's primary contention was, and still is, that Paragraph 11 does not apply to the case at bar, *i.e.,* that since appellant's product is not of a patented, secret or unique nature, Paragraph 11 has no application. As an alternative argument, appellant contended that *if* Paragraph 11 applied it constituted nothing more than an agreement that the dies belonged to appellee and that appellant was to pay only a charge for their use. The trial court agreed with appellee's primary contention which consequently rendered appellant's alternative argument moot. Appellant has not deemed it necessary to state fully appellee's contentions, apparently with the hope that appellee also would not.

Appellant then refers to a question by the trial court [Tr. p. 405] and states that ". . . counsel for appellee made no objection or contrary argument." (A. O. B. p. 18.) Appellant does not point out, however, that the trial court was directing his remark "specifically and solely" to Mr. Mahoney and that the dialogue took place during appellant's closing argument, a time when appellant's counsel was neither expected nor had the right to interrupt.

The final references to "judicial admissions" by appellant are equally interesting. (A. O. B. pp. 18-19.) The full context of these statements shows only that "under Paragraph 11" appellee contended that it still held title to the dies. They are not admissions that Paragraph 11 necessarily applied to the dies involved in this case, or that Paragraph 11 constituted an agreement for the exclusive use of the dies. References to the parts of the record not cited by appellant indicate that appellee always contended that there was no contract between appellant and appellee and that Paragraph 11 had no application to the case at bar. [Tr. pp. 83-84, 89, 280, 430-431.]

2. Further Evidence. (A. O. B. pp. 19-21.)

Appellant continues its argument of the evidence by referring to what is called "further evidence." Here appellant argues that since appellee inserted in the die drawings the word "Panaview" opposite a space entitled "customer," it must follow that the dies were constructed both "specifically and solely" for appellant. This is insubstantial. This fact shows only that the dies were made "specifically" for appellant, a fact which was expressly admitted in the court below.

Appellant next seeks to rely on the fact that the original drawings submitted to appellee bore the marks "patents pending." This too is insubstantial, for appellant twice conceded that the sliding door involved in fact was not patented and that the patent applications had been dropped. [Tr. pp. 141-142, 150.]

Appellant then argues that because appellant paid a "substantial" die charge for the use of the dies it must follow that appellant obtained their exclusive use. This

argument is an off-shoot of appellant's argument that if Paragraph 11 doesn't apply, then appellant must have purchased the dies and thereby had the right to their exclusive use. [Tr. p. 87.] In finding to the contrary [Tr. p. 58], the trial court had before it the following facts:

a. The cost of the dies were more than twice what appellant actually paid. [Tr. p. 343.]

b. The amount paid by appellee was termed a "die charge." [Ex. 21; Tr. pp. 254-255.]

c. Appellant paid no sales tax on the dies. [Ex. 21; Tr. pp. 254-255, 434.]

d. Appellee manufactured more than one set of dies for use on appellant's order. [Tr. pp. 354-355.]

This evidence is clearly sufficient to support the trial court's finding that appellant only paid a service charge for the use of the dies and that appellant neither acquired title to the dies or the right to their exclusive use.

Finally, appellant refers to a letter alleged to have been written by an attorney on behalf of appellee. (A. O. B. p. 21.) This letter is one of the subjects of appellee's motion to strike. It was neither offered nor received in evidence, although it was available to appellant's counsel during trial. [Tr. p. 54.] Appellant's reference to this document is most improper and needs no further consideration.

Before leaving this part of appellant's argument, appellee feels called upon to comment on the seemingly innocuous sentence used by appellant which reads:

> "But compare, claim of 'custom,' R. 25-27, later abandoned, R. 292."

Appellant implies that appellee relied upon custom and usages of the industry and later abandoned them. Such is not the fact. Appellant was the one which relied upon customs of the industry [Complaint, Par. IX; Tr. pp. 6-7] and subsequently abandoned the contention. [Tr. p. 295.]

3. Conduct of the Parties, (A. O. B. pp. 21-22.)

In reviewing the evidence, appellant next refers to what is termed "conduct of parties." Under this heading, appellant refers to one portion of appellee's opening statement, isolates the words "made for Panaview," and argues that this shows appellant had "an interest in these dies under the contract." This type of reasoning is fanciful. The issue here is not whether appellant had an interest in the dies but rather what the nature of its interest was. Appellee conceded at trial that the dies were not only made for appellant's use but also that they were made specifically for appellant's use. This, however, does not answer the question whether they were made solely for appellant's use.

Appellant next refers to the fact that additional dies were made to produce extrusions for Windsor, and asks: "Why would appellee bother to duplicate dies if it owned them outright with all rights to use them for anybody in the world, solely in its own discretion?" There's a rule about asking rhetorical questions: Don't ask them when your opponent has the opportunity to answer. In the first place, the testimony of Mr. Hairston shows not only that the dies were duplicated for use on Windsor's orders but also that in the particular case of the dies "built for Panaview" appellee had originally manufac-

tured more than one set of dies. [Tr. pp. 354-355.] Appellee duplicated the dies when Windsor came into the picture so there could be no confusion, delay or interference with appellant's future orders, it being assumed that appellant would continue to order extrusions. Appellee originally manufactured more than one set of dies for use solely as part of its internal production method. The making of extrusions involves a large plant, heavy equipment and many workmen. Each job must be so scheduled that it will not interfere with the approximately 8,000 other products going through appellee's extrusion mill at any given time. [Tr. pp. 352, 357.] A break-down at one stage would delay the whole production process. Consequently, appellee manufactures duplicate dies, at a relatively small cost compared to that which would be involved if the whole production process were delayed, in order to insure itself of as great a production capacity and efficiency as possible.

4. Surrounding Circumstances. (A. O. B. pp. 22-23.)

Appellant concludes its argument of the evidence under the title "surrounding circumstances." The contentions of appellant with respect to this argument are grossly misleading. Appellant states, in connection with transactions occurring prior to the one herein involved, that appellee had "written letters to *appellant* asking whether dies should be destroyed or stored" and that "*appellant* was directly advised that it had exclusive use of the dies on which it paid die charges." This is wholly untrue. Appellant has again deemed it unnecessary to point out that this previous transaction was with Glide Windows, Inc., a corporation—*not appellant.*

The evidence with regard to this transaction is summarized in the first few paragraphs under the heading "Statement of Facts" which appears in the early portion of this brief. It is clear that Paragraph 12 used in the Glide order is different from Paragraph 11 used in appellant's orders. Paragraph 12 refers by description to "any equipment . . . which Seller constructs *specifically* for use on Buyer's order" and then states affirmatively that "all *such equipment* will be used exclusively for the manufacture of products for Buyer." Here there is an express mandate that any die made specifically for one customer *will* be used exclusively for that customer. Paragraph 11, on the other hand, contains no such mandate.

Appellee insists that the difference between Paragraph 11 and Paragraph 12 is only one of form, not substance. The plain reading of the language used in each, however, demonstrates the contrary. The significance of the difference is emphasized, moreover, when it is realized that the products referred to in the Glide orders were patented. [Tr. pp. 250-251.] This fact alone makes it apparent that the Glide-appellee transaction is completely different from the one before this court and, therefore, that it has no bearing on this case.

The whole of appellant's second argument for reversal, although couched in terms of "judicial admissions" and the like, is nothing more than an argument of the evidence. It must fail, for as pointed out in Part II-B of this brief, the findings of fact made below have substantial support in the evidence.

C.

Appellant's Third Argument for Reversal Is That: A Property Right Existed in Appellant Because of Its Creation of Original Designs for Sliding Doors Submitted in Confidence to Appellee. (A. O. B. p. 25.)

Appellant's third argument for reversal refers to its cause of action for breach of a confidential relation. The argument is as follows:

a. Appellant created a design.

b. The design was submitted to appellee.

c. Therefore, the information was privately owned and not intended for public distribution.

d. Appellee's wrong was aggravated because appellee:
   (1) Breached its trust with appellant,
   (2) Stole its customer, and
   (3) Entered into competition with appellant.

The basic fault of this argument lies in the fact that the premises adopted by appellant have no foundation in the record. To begin with, appellant's first premise assumes that the drawing it created related to a design or information which had the stature of a "trade secret." While appellee did not dispute that the drawing was appellant's creation, appellee vigorously disputed that the design or information constituted a trade secret. The evidence introduced by appellee in this connection showed that the extrusions were neither patented [Tr. pp. 141-142, 150] nor even unique. [Tr. pp. 20-21, 37.] They were similar in both shape, design and appearance to the components of many sliding doors already on the market. [Tr. pp. 36-38.] In this regard Mr. Meyer expressly testified that part for part each component of

the Panador was similar in shape and design to the components of other doors. [Tr. pp. 325-327.] Even Mr. Grossman admitted, on cross-examination, that each of the parts used in the Panador had been used in other sliding doors. [Tr. pp. 150-151.] Even more significant is the fact that a model of the Panador was introduced into evidence, from which it was clear to the trial court that it was nothing more than a standard sliding door with no new, novel or unique features. [Ex. 7; Tr. p. 125.] Moreover, at no time in any stage in the placing of appellant's order was there any indication, suggestion or discussion of any kind that the work being performed for appellant or the designs of such work were of a secret, confidential or unique nature. [Tr. pp. 26, 32, 36.] This evidence fully justified the trial court's conclusion that the design was not of a secret nature and that there was no confidential relation between appellant and appellee.

Appellant's contention that appellee stole its customer is completely refuted by the testimony of Mr. Reznick and Mr. Gunderson that Windsor wanted to continue buying doors from appellant, but that *appellant* refused to continue selling doors to Windsor because Windsor's accounts had not been paid. (See this Brief: Objections to Appellee's Statement of the Case, Point 5.) Appellee's contention that appellee entered into competition with appellant also has already ben answered. (See this Brief: Argument, Point II.B.3.)

Equally fatal to appellant's argument is the fact that appellee did not divulge any of the information with respect to the design of the Panador to Windsor or

anyone else. Appellee's evidence established this fact and was not controverted. [Tr. pp. 20, 33, 36-37, 363.] In truth, appellant itself disclosed all of the information regarding the design of the sliding door at the time it placed it on sale to the public. The only act of appellee in question is that of using its existing dies to produce extrusions for Windsor. This is not wrongful unless Paragraph 11 is held applicable to this case, it not being claimed that appellee's act violated any custom or usage of the trade.

Although appellant has not set forth the facts of the cases cited in support of its argument, it is obvious from the opinion in each that they have no application to the case at bar. Unlike the situation presented on this appeal, each of cases relied upon by appellant concerned matters which clearly constituted trade secrets. In each, the process, product or formulae involved was in fact new, novel, unique and secret—and in most cases patented. In short, appellant's argument depends upon the existence of a trade secret, a fact not established in this case. As is stated in the Restatement of Torts, Section 757:

> "The subject matter of a trade secret must be secret. Matters of public knowledge or of general knowledge in the industry cannot be appropriated by one as his secret. Matters which are completely disclosed by the goods which one markets cannot be secret."

Since the evidence demonstrated that the design of the sliding doors was neither patented nor different from many other sliding doors already on the market, it did not reach the stature of a trade secret. Prior to appellant's drawing, both the shape and design of the extrusions were publicly

known to the trade in general. Moreover, the extrusions themselves were non-unique, functional parts publicly known to the trade in general. As such, appellant did not have a protectable right in either the extrusions or the design of the extrusions, either before or after sale of the door to the public.

Levine v. E. A. Johnson & Co., 107 Cal. App. 2d 322 (1951);

Pagliero v. Wallace China Company, 198 F. 2d 339, 342 (9th Cir., 1952);

Aetna Bldg. Maintenance Co. v. West, 39 Cal. 2d 198, 206 (1952);

Continental Car-Na-Var Corp. v. Moseley, 24 Cal. 2d 104 (1944);

DeLuxe Box Lunch & Catering Co. v. Block, 86 Cal. App. 2d 434 (1948).

D.

Appellant's Fourth Argument for Reversal Is That: Confidential Relationship May Be Implied From the Acts of the Parties and No Express Agreement Need Be Made. (A. O. B. p. 28.)

Appellant here argues that a confidential relationship may be implied from the acts of the parties and that no express agreement is necessary. With this there can be no argument. It does not follow, however, that a confidential relationship may be implied from the acts of the parties in this case.

The cases relied upon by appellant concern the same situation: Submission of the design of a patented product to another for the sole purpose of permitting him to decide whether he wishes to purchase the design. Admittedly, the fact that the product was patented is not controlling,

but it does establish without doubt that the design involved amounted to a trade secret. This is the crucial fact which is absent in the case at bar.

Appellee has not established the existence of a contract for sole and exclusive use of the dies, and no other facts have been established from which a confidential relationship can be seen to exist. Appellant's claim that it reposed confidence in appellee or that it relied upon appellee, even if proved, is not sufficient to establish a confidential relation. Appellee must have been shown to have voluntarily accepted or assumed the relationship of personal confidence with appellant.

Ruhl v. Mott, 120 Cal. 668, 679 (1898);
Jackson v. Gorham, 98 Cal. App. 112, 116 (1929);
Meyer v. Zuber, 92 Cal. App. 767, 772 (1928);
Hausfelder v. Security-First National Bank, 77 Cal. App. 2d 478, 482 (1946).

E.

Appellant's Fifth Argument for Reversal Is That: The Public Sale of Articles Made in Accordance With Confidential Drawings Did Not Destroy the Confidential Relationship Between the Parties as to Such Drawings. (A. O. B. p. 30.)

This argument of appellant is two-fold. The first phase is that (1) it would be a time-consuming, expensive, and laborious procedure to actually duplicate the dies and (2) therefore, if appellee had not used its existing dies, Windsor would have been *forced* to continue buying doors from appellant. In a small way, this argument is but a preview of the only point made by appellant in its sixth argument for reversal. It deserves, however, some attention at this time.

To establish the premise of this argument, appellant relies upon "a matter of judicial notice." The portion of the record quoted, consequently, must be read carefully in order to determine what was established. When this is done, it is apparent that all the trial court was willing to "assume" was that it would take time to make dies and get into production. Nothing is said, however, about how much time, and the only evidence in the record on this point completely refutes appellant's conclusion that had appellee not used its existing dies, Windsor would have been forced to continue to purchase doors from appellant. Mr. Grossman admitted that the doors "could be copied within the time it takes to make extrusion dies." [Tr. p. 155.] This only takes from one to three weeks. [Tr. p. 30.]

The second portion of appellant's fifth argument for reversal is that a sale of the product on the open market does not destroy the confidential character of the design or production information underlying the product. There are two answers to this argument.

First, the rule contended for assumes that the underlying design or production information is in itself a trade secret. As has been pointed out in answer to appellant's previous arguments, the evidence in this case fully supports the conclusion of the trial court that the extrusion designs here involved were not in fact trade secrets. (This Brief: III.C.)

Second, the rule contended for assumes that the underlying design or production information is not actually revealed to the public when the product alone is sold on the open market. This is the exact premise relied upon by

the court in *Tabor v. Hoffman,* 118 N. Y. 30, 23 N. E. 12 (1889), cited by appellant at page 33 of its brief. The same is true of *Frank v. Wiltschek,* 209 F. 2d 493 (2nd Cir., 1953), also relied upon by appellant. This case concerned the process of compressing cloth into a small pellet so that when it was dropped into water it would unfold and form a washrag. The defendants in the case, during feigned negotiations to become salesmen for plaintiff, learned the process of manufacture, costs of production, capacity of the plant and the customers of plaintiff. Such information clearly constituted a trade secret and, more important, was not revealed to the public when the cloth pellets alone were sold on the open market. The court, therefore, properly restrained the defendants from using the information for their own profit. While a different product was involved, essentially the same situation was presented to the court in *Sketchley v. Lipkin,* 99 Cal. App. 2d 849 (1950).

The fact which distinguishes these cases from the one at bar is that here the design underlying the aluminum extrusions *was* revealed to the public by the mere sale of the door on the open market. Unlike the complicated pump involved in *Tabor v. Hoffman, supra* (which required a special design to compensate for heat changes), the shape, design and dimensions of the extrusions here involved were obvious from the extrusions themselves. Once the door was sold to the public, its shape, design and dimensions were no longer secret, even assuming that they were originally.

Levine v. E. A. Johnson & Co., 107 Cal. App. 2d 322 (1951);

Restatement of Torts, Comment, Sec. 757.

F.

Appellant's Sixth Argument for Reversal Is That: The Essence of the Wrong Done by Appellee Lay in Its Breach of Trust and Misuse of Confidenial Information Submitted to It by Appellant for Its Own Profit. (A. O. B. p. 35.)

Apart from the magnificent title of this argument, appellant's only point appears to be that appellee did not make drawings from the sample submitted to it by Windsor and thereby appellant suffered a "tremendous unfair advantage" since it had to wait from April 20, 1954 to October 1954, to obtain its first extrusions while Windsor was able to get them immediately. Here appellant reverts to the unjustified inference in an attempt to support its appeal.

In the first place, appellant did not have to wait from April 20, 1954 to October 1954, to obtain extrusions. Appellant points to Exhibit 1 [Tr. p. 39], but this only shows that the *final* shipment of extrusions was completed in October 1954. It was clear at the trial that the first shipments of extrusions occurred long prior to October 1954. [Tr. pp. 244-245.] Moreover, the time delay shown in Exhibit 1 for the other orders of appellant indicate that no substantial delay resulted from the necessity of making die drawings. The drawings themselves, in fact, are dated April 21, 1954, April 22, 1954 and April 26, 1954. [Tr. pp. 461-469.] This is a period of only 1, 2 and 6 days from the date of appellant's first order. More important in refuting appellant's argument is that Mr. Grossman admitted, on cross-examination, that the door could be copied within the time it takes to make extrusion dies. [Tr. p. 155.] This only takes from one to three weeks. [Tr. p. 30.]

G.

Appellant's Final Argument for Reversal Is That: Appellee Unfairly Competed by Using Confidential Information to Alienate Appellant's Customer and to Engage in the Sale of Aluminum Sliding Door Parts of Appellant's Design in Competition With Appellant. (A. O. B. p. 37.)

This argument of appellee is not only its last but also its most cavalier. It assumes as established almost every fact which was in issue in the court below and which was there decided adversely to appellant. The only statement in this argument which is true is the following: One of appellee's defenses to appellant's cause of action for unfair competition was that appellee did not compete with appellee. Appellee's contentions in this regard have already been set forth in Part II.B.3. of this Brief. The statement that appellee sold to "appellant's customer" also has been refuted in this Brief in Point 5 of Appellee's Objections to Appellant's Statement of the Case where it was shown that Windsor's customer relationship with appellant was severed *by appellant* prior to the time appellee sold extrusions to Windsor.

The real vice of appellant's argument is that it attempts to classify appellee's alleged wrong as "unfair competition." The evidence only showed that appellee manufactured extrusions for use in sliding doors and was in fact the source of extrusions for both appellant and its competitors. Appellee did not compete with either appellant or any of its competitors in the assembly or sale of finished sliding doors. Unfair competition cannot exist

unless there is actual competition, and that cannot exist in the absence of some competing commodity or person.

Scutt v. Bassett, 86 Cal. App. 2d 373, 376 (1948);

Canister Co. v. Owens-Illinois Glass, 95 F. 2d 303, 304 (3rd Cir., 1938).

Even if competition exists, however, it is not unfair unless appellant's acts were calculated to deceive or confuse the general public with respect to the source of the product involved. Here, of course, the elements of "palming-off" and "secondary meaning" are essential.

Italian Swiss Colony v. Italian Vinyard Co., 158 Cal. 252, 255-256 (1910);

Excelsior Milling Co. v. Taylor Milling Co., 43 Cal. App. 591, 594 (1919);

Restatement of Torts, Secs. 712, 741, 742.

The elements of palming-off and secondary meaning are not involved in this case. [Tr. pp. 69, 73, 78, 422, 425.] Accordingly, the doctrine of unfair competition has no application here. The two cases cited by appellant are not in point for the same reason. Each involves the aspect of "confusion in the public mind," a fact which is not present in the case at bar.

Conclusion.

Each of the arguments made by appellee for reversal of the judgment entered below depend upon circumstances which have little or no support in the record and which in fact were resolved against appellant by the trial court. Consequently, appellant's arguments, denominated "matters of law," are in reality merely arguments of the evidence and the facts and inferences to be drawn therefrom. After a full and complete trial, the District Court con-

cluded that the design of the extrusions did not constitute a trade secret, that there was no confidential relation between appellant and appellee, and that appellee did not unfairly compete with appellant. Admittedly some of the evidence is conflicting, but there is substantial evidence in the record on appeal to support each of the conclusions of the trial court.

Apart from the legal considerations here presented, it is difficult to conceive of any equitable basis for appellant's claim. Appellant was in a very competitive business selling a non-patented, non-unique product. Because of appellant's own refusal to continue to sell to Windsor, Windsor decided to manufacture its own door. This Windsor had a right to do. In the ordinary course of its business and that of appellee's, Windsor placed an order with appellee for several different aluminum products. Among the products ordered were extrusions for a sliding door. The design of the desired extrusions was given to appellee by Windsor in the form of a sample. There was no collusion between appellee and Windsor as against appellant, it appearing in fact that the Windsor order was handled by sales personnel of appellee who had no connection whatsoever with appellant's orders. When the sample was submitted to appellee's engineering department, it was discovered for the first time that appellee already had dies on hand which would make the desired extrusions. Following its normal procedure in the case of non-unique, non-patented and non-secret products, appellee used its existing dies to make the required extrusions. From these facts appellant argues that appellee's acts permitted Windsor "to avoid purchasing doors from appellant." This argument is unjustified.

For the reasons and upon the grounds hereinabove set forth, appellee respectfully urges this Honorable Court to affirm the judgment of the District Court.

Respectfully submitted,

ADAMS, DUQUE & HAZELTINE,
Attorneys for Appellee.

HENRY O. DUQUE,
LAWRENCE T. LYDICK,
JAMES S. CLINE,
Of Counsel.

No. 15059

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PANAVIEW DOOR & WINDOW CO.,

Appellant,

vs.

REYNOLDS METALS COMPANY,

Appellee.

Appeal From the United States District Court, Southern District of California, Central Division.
Hon. Wm. C. Mathes, Judge.

REPLY BRIEF FOR APPELLANT.

MACBETH & FORD,
THOMAS P. MAHONEY,
PATRICK H. FORD,
1709 West Eighth Street,
Los Angeles 17, California,
Attorneys for Appellant.

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REPLY BRIEF FOR APPELLANT.

I.

Appellee's Brief Fails to Point Out Any Tenable Theory to Uphold the Finding of No Breach of Contract.

Appellant's Brief argued that the contract between the parties was unambiguous and that both parties had regarded printed Paragraph 11 as their contract about the dies in question. Said Brief pointed out, moreover, that the trial court erred in shifting the burden of proof to appellant to explain any uncertainty which can be found in a contract drafted entirely by appellee (Brief for Appellant, Points I and II).

Appellee's Brief fails to point out any substantial evidence—or any evidence at all—to support appellee's view of Paragraph 11 of the Contract.

Appellee conceded that the dies were made "specifically" under the contract [R. 430]. Appellee cites no evidence from the record to support its view that these dies were not made *solely for appellant* under the contract.* Not one word is cited to indicate that appellee intended *ab initio* to use these dies for its own account or for any other customer.

Appellee admits that Paragraph 11 is applicable to dies for *patented* products. (Appellee's Br. p. 59). The record here is clear that Appellee was informed from the outset that Appellant had a "Patent Pending" [R. 457-458]. Does this not make it clear that Appellee made these dies *solely* for use on Buyer's order? For Appellee to have made the dies for any other purpose would have been pure speculation that the patent application would not be granted, or would be later abandoned, and that another customer would come along who would want the same extrusions.

Appellee pretends to cite as "evidence in the record" pages 25-27 and 32 of the transcript, being alleged "evidence" of a custom in the industry that a die charge was only for use of dies and "that the supplier was free to use the dies on anyone's order so long as there was no interference with the original buyer's orders" (Appellee's Br. p. 42).**

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*The Answer admitted that the dies were "necessary for the manufacture of said extrusions" [R. 10]. For what else were they "necessary"?

**In several other places, appellee also cites this alleged evidence of custom, Appellee's Brief, page 6 ("uncontroverted evidence introduced by Appellee * * * showed it is the custom * * *"), p. 13 ("uncontroverted evidence * * * that * * * it is the custom * * *"), p. 18 ("in so doing Appellee followed the normal and customary usages of the trade").

The plain fact is that *there was no evidence in the record as to any such custom!* The citations are to the affidavits of William O. Yates [R. 25-27] and James M. Hairston [R. 32], which did mention a custom. However, *that part of the affidavits which related to alleged customs was never received in evidence at the trial.* As Mr. Duque remarked in his closing argument:

> "* * * We did not go into the custom and usage in the industry, so I will not argue that" [R. 438].

Before he offered the Yates and Harrison affidavits, appellee's counsel also said:

> "*Mr. Duque:* * * * Your Honor, I also offer the affidavit of James M. Hairston * * *. So in all of the affidavits that I offer, or in any of them, *any testimony with regard to the custom and usage in the trade, I would not offer and would not care to have a part of the record at this time*" [R. 292]* (Emphasis supplied).

That appellee has no excuse for overlooking or forgetting this part of the record is made clear by the fact that appellee itself cites this very page 292 on page 61 of appellee's Brief.

A few additional comments are required with respect to appellee's treatment of the contract count of appellant's case. *First,* the allegation of custom in the complaint was only in the Second Count, where it was alleged that there was a custom to "keep confidential all information dis-

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*Curiously this is the place in the record at which appellee abandoned, the custom-defense, after seeing the letter of its counsel, Mr. Galea [R. 55-56], which it now seeks to strike as "not offered or received in evidence at the trial." (Appellee's Br. p. 2.)

closed * * * by * * * customers * * * in blueprint form" and to "use dies paid for by one customer only for that customer's order" [R. 6-7]. This custom was independent of contract and was not incorporated in the first count of the complaint [R. 3-5]. At the trial, appellant made no attempt to prove this allegation, inasmuch as it was regarded as surplusage in view of the cases cited in Appellant's Opening Brief (pp. 26-34). Appellee's argument that this change on the theory of the Second Count in some way weakened or rebutted the first count is very tenuous (Appellee's Br. pp. 41-42).*

Second, appellee argues that there is a silent and invisible "If" in Paragraph 11 of the contract, and that the clause purporting to apply to "any" dies really applied only to "some" dies (Appellee's Br. p. 42 *et seq.). No attempt is made to answer appellant's argument that Paragraph 11 necessarily applies to any die for which a die charge is made, inasmuch as it is the only part of the contract providing for Buyer to pay die charges* (Brief for Appellant, pp. 10-15). No witness testified that Paragraph 11 should have had an "if" in it.

Third, appellee argues that appellant's evidence substantiated the trial court's interpretation of Paragraph 11, and then cites Exhibit 5, which it strangely argues is not binding on appellee because it was a contract with a sepa-

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*Appellee's argument fallaciously assumes that the custom alleged by plaintiff was the opposite of the custom alleged by defendant. Actually, defendant alleged a custom as to the *meaning* of the contract on die use and die charges. Plaintiff alleged a custom on die use—independent of contract.

rate corporation (Appellee's Br. p. 45).* While it might be fairly argued that the two distinct corporate entities involved in some way weakened appellant's theory, it can hardly be turned into proof that this contract had a meaning opposite to the meaning which appellant was led to understand. The surrounding circumstances included the contracts theretofore in use by appellee, with a corresponding die-clause. Appellant's point is that such prior corresponding die paragraph

(1) tends to show that Paragraph 11 is applicable to the dies in question, and

(2) tends to show that the slight change in language was not intended to change the meaning.

The important point is that anyone who had done business with appellee on the old form of contract would be led to believe he was still protected, when the switch was made to the new form. This argument is ignored by appellee's Brief (see Brief for Appellant, pp. 22-33).

Fourth, in answer to the dilemma which appellant proposed—that a buyer of extrusions who also pays a "die charge price" is *outright owner* of the dies, unless Paragraph 11 is applicable [R. 44, 406-408, 444, 447]—appellee cites the "evidence" of custom, which is above shown to be not part of this record! (Appellee's Br. p. 47.) Next, appellee cites the price differential: $1430 paid *versus* $3176 cost. Of course, there are two short answers: (1) appellant was charged for only one set

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*The other corporation had the same address and management, as Appellant [R. 94, 107, 224]. Appellee offered evidence at the trial regarding credit extended to the *other* corporation, showing that appellee regarded the two businesses as inter-locking [R. 12-16, 291; *Cf.* Appellee's Br. p. 8 for similar reference].

of dies on the order [R. 254-255], and (2) as Judge Mathes wisely remarked:

> "The Court: I assume that their answer to that is that it is your business what you charged them * * *" [R. 440].

Whether appellee gained or lost on the transaction could only be determined by examination of the entire order. including the extrusions [R. 254-255]. Whether the price quoted on the nine dies was high or low is of no significance, standing alone—*except that appellee obviously led appellant to believe that the $1430 die charges had reference to Paragraph 11 which was the sole "term and condition" providing for "die charges!"*

Fifth, appellee dares to argue that *appellant ordered only extrusions* not *dies!* (Appellee's Br. p. 12.) This argument ignores the Findings *drafted* by appellee's own counsel:

> "It is true that * * * plaintiff placed with defendant * * * orders for the manufacture by defendant of *extrusion dies* * * *" (Emphasis supplied) [R. 58, par. II].

It also ignores Exhibit 21, produced by appellee on subpoena, being the file copy of appellee of the original order for the *nine dies!* [R. 254-255.]

Appellee's Brief makes no reference to this evidence, nor to said Finding.

Sixth, appellee attempts no reply to appellant's argument that Paragraph 11 is meaningless if it is not applicable to these dies, and that to make the contract reasonable it is necessary to follow the established statutory and case-law and construe the contract as a whole "to give a

sensible meaning and effect to all its provisions" (Brief for Appellant, pp. 10-15).

To the cases cited in the opening brief, appellant now desires to add *Ulmann v. Sunset-McKee Co.* (9th Cir., 1955), 221 F. 2d 128, which shows that this Court will review the construction by the trial court, and that the promisee "should have the advantage of * * * language which is susceptible of two intrinsically reasonable but opposite constructions." Also, the case of *Pope & Talbot v. Guernsey-Westbrook Co.* (9th Cir., 1947), 159 F. 2d 139, which illustrates the practice of construing the "Terms and Conditions" on the reverse side of an acceptance to apply to the matters contracted on the face thereof. The Court said:

> "The freight clause must be construed as a whole. Appellant's contention would make meaningless the later words 'after loading' * * * It is without merit."

Seventh, what does appellee reply to our argument that it was judicially admitted, in divers ways, that Paragraph 11 was applicable to the dies here involved? Appellee argues that the admission was a conditional one, that "if applicable" Paragraph 11 was no help to plaintiff. No doubt such inconsistent arguments was also made by appellee, but the places cited by appellant are not subject to such interpretation. In the places cited in the Brief for Appellant, there is no question at all that appellee was claiming Paragraph 11 to be applicable (Brief for Appellants, pp. 17-19). Appellee's argument that

> "Appellant has not deemed it necessary to state fully appellee's contentions, apparently with the hope that appellee also would not" (Appellee's Br. p. 59)

is worse than no reply at all, because it points to no inaccuracy in any of the direct quotations in the Brief for Appellant—and thereby is in effect a confession that the quotations are accurate and not out of context. The contention that appellee's "full argument" was broader in scope is *a mere confession that their defense did shift* [*Cf.* R. 432-433].

Appellee also attempts to "distinguish" its admissions by pointing out (at p. 60 of its Brief) that it never admitted appellant's interpretation of Paragraph 11. *Of course, the admission was merely that Paragraph 11 was applicable.* That being established, the sole question is what does Paragraph 11 mean? The point, which appellee misses, is that the *admission* of applicability is inconsistent with the Conclusion of Law that appellant had failed to sustain the burden of proving applicability of Paragraph 11 [R. 60, Concl. of Law No. I]. As far as the *meaning* of the clause is concerned, even appellee's Brief is frank enough to admit that the clause *means* the dies will not be used except for the one who pays the die charge—but the Brief attempts to limit the *applicability* of the clause to "classified or secret military products or highly specialized, technical, or unique equipment" [Appellee's Br. p. 6, citing R. 25-27, the affidavit of Mr. Yates' stating such to be the meaning "by custom and usage" of Paragraph 11 of the terms and conditions," which as shown *supra* is *not* in evidence, R. 292].

Eighth, appellee does not deal at all with the problem of whether the trial court committed reversible error in holding that appellant had the burden of proof by a preponderance of the evidence as to any ambiguity or uncertainty in the contract, drafted by appellee [see Concl.

of Law I, R. 60]. It is difficult to locate a case in point on burden of proof under the parol evidence rule, because such matters are generally determined by a court, without a jury, on conflicting evidence, in which case the point is not reviewed on appeal, since the trial court has made no express ruling as to who had the "burden of proof." Here, however, the Court used the "burden of proof" thesis as its rationale, and appellant has now found a case in point under a statute similar to the California Code. The case is *Blankenship v. Decker* (1906), 34 Mont. 292, 85 Pac. 1035, which reversed a jury verdict because of an error in instructions. The Court said:

> "* * * no greater burden rests upon the promisor [who drafted the contract] than to show by a preponderance of the evidence that the promisee understood it as he (the promisor) believed he understood it. He is not required to show by a preponderance of the evidence what the promisee in fact understood."

The California Supreme Court, in *Laidlaw v. Marye* (1901), 133 Cal. 170, 179, 65 Pac. 391, reversed a finding and judgment in favor of an assignee of the draftsman of a contract, on the ground that, if the contract were regarded as ambiguous, there was no evidence to support a finding in favor of the party who drafted the agreement. Although this case fails to use the terminology of "burden of proof," it seems that the implication was that the draftsman or his assignee had the burden, otherwise a finding in his favor, without evidence, would not be prejudicial error. This case may therefore, be regarded as close, if not exactly in point.

II.

Is It a Tort in This Circuit for a Manufacturer to Go Into Business on Its Own Account Using Drawings Conceived and Submitted to It by a Customer for Use in Making Dies for Extrusions Ordered by the Customer?

Appellee states that the rule of *Tabor v. Hoffman,* 118 N. Y. 30, 23 N. E. 12 and *Frank v. Wiltschek,* 209 F. 2d 963 (Appellee's Br. p. 71), assumes that the production information is not revealed to the public by the product. Appellant is in complete accord with this position, and it was established as a matter of judicial notice that the use of appellant's door as the sole source of information would have entailed delay, expense, and labor. [R. 132-134.] At the trial appellee did not contend that public sale of the product revealed the secrecy of the drawings. Indeed, appellee contended the drawings were still secret.*

Appellant's argument on the establishment of a legally protected interest in the extrusion drawings of the Panador which appellant submitted to appellee is not adequately answered in appellee's Brief.

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*"Mr. Duque. * * * *There is no evidence in the record that we have* ever breached any trust or breached any confidence or *have shown any drawings or shown to Windsor any drawings or extrusions or anything else that we were not supposed to have shown"* [R. 284, emphasis supplied]. Again: "Mr. Duque: If the court please, there is no evidence in the record that we misused his drawings. * * * That plaintiff used the die tools to produce extrusion for Windsor. But we never misappropriated the drawings. We never disclosed them to anybody else. * * *" [R. 437.] *Cf.* Hairston Affidavit, R. 33, to same effect.

There is a well recognized tort which consists in the misuse of such drawings by one business concern, which deals at arms length with the originator of the drawings—in spite of the lack of any fiduciary or trust relationship in the strict equity sense. The tort occurs even if there is nothing unique about the drawings and even if all the information therein was in the public domain prior to its submission.

The cases which establish this tort are discussed fully in Points III to VI of the Brief for Appellant (pp. 25, 50, 36).

Appellee's Brief cites and attempts to answer only a few of these cases.

Appellee has failed to controvert appellant's position that appellee wrongfully and wilfully misappropriated appellant's trade secret in appellant's extrusion drawings for the Panador.

Appellee admits that the drawings were appellant's creation. It is admitted that the drawings were submitted to appellee to make die drawings therefrom. Therefore, these new and original drawings, previously known only to appellant, were a trade secret which was communicated to appellee.

Appellee admits it made die drawings from appellant's drawings and then made dies from the die drawings. Appellee then misused the dies for its own gain to appellant's great harm.

The trial court recognized that unless appellant had been in possession of appellee's secret it could not have entered the field so expeditiously as it did [R. 132-134].

Thus possession of the secret imparted to it by appellant enabled appellee to betray the trust reposed in it by appellant, without expense, delay, and labor, because it necessarily used the drawings given to it by appellant to make the dies used to compete with appellant.

Appellee in its argument assumes that it is in the same position as the public so far as information revealed by the door itself as concerned. This is not so since appellee was prevented by its relationship with appellant from using information which might be freely used by the public if available to public.

Frank v. Wiltschek (2d Cir., 1953), 209 F. 2d 493.

And even if it were true that appellant could do what any third party could do, *i.e.,* copy this Panador, appellant did not limit itself to making new dies experimentally from study of extrusions bought on the open market. It used the dies made from the drawings submitted by appellant [see Stipulation, Ex. 1; R. 40-41].

Appellee takes the position in its brief that there is substantial evidence to support a finding that appellant's drawings were not unique and disclosed only ideas already in the public domain. Assuming, without conceding, that there was any such evidence or finding, it is submitted that appellee's position remains untenable—because the cases cited show that even such drawings, submitted for a business reason, cannot be used by the submittee without its being liable in an *ex delicto* action. For example, in *Smith v. Dravo* (7th Cir., 1953), 203 F. 2d 369, the defendant used plaintiff's information and blueprints in designing its own container device, the plaintiff having

submitted the blueprints to defendant solely to enable defendant to appraise the design with a view to purchase of plaintiff's business. A judgment for defendant was *reversed,* even though the container itself had already been on the market and some of the construction details were in the public domain.

Likewise, in *Ackerman v. Gen. Motors* (4th Cir., 1953), 202 F. 2d 642, in an opinion by Parker, C. J., a defense judgment was *reversed,* the plaintiff being held entitled to damages from the date he disclosed the details of his unpatented design to defendant, while a patent was pending, the defendant having used the design to draft its own similar product. That such a tort exists under California law seems clear from *Holley v. Hunt* (1936), 13 Cal. App. 2d 334, 336, 56 P. 2d 1240, where defendant operated a job shop and made unpatented articles for plaintiff. Defendant started to make the device for his own benefit, and an injunction followed, which was affirmed on appeal. As the Court said:

> "Basically, respondent asked protection from injury by fraudulent means, to wit, the use by appellants of trade secrets gained in a confidential relationship, and injunction is a proper remedy (*Vulcan etc. Co. v. American Can Co.,* 72 N. J. Eq. 387, 67 Atl. 339, 12 L. R. A. (N. S.) 102)."

The latter case has some apt language which points up the weakness of appellee's position here, to wit:

> "To this the trustee might indeed answer: 'It is true that I agreed to keep your secret from others; but I did not agree that I would not myself make use of it in competition with you.' But it is not

> likely that a court of equity would regard such answer as in any way ingenuous or exculpatory." (12 L. R. A. (N. S.) at 110.)

There is no question, in the instant case, that appellant made an "original drawing" [R. 96] and "reduced [it] to blueprint form and submitted [it] to defendant in that form" [Findings V, R. 59]. It is appellant's position that this was a bailment of the drawing, as a matter of law.

When appellee used this drawing for its own benefit, there is no question that it violated the recognized law of California. As Mr. Justice Moore said for a unanimous California Supreme Court, in the case of *Hollywood Motion Picture Equip. Co. v. Furer* (1940), 16 Cal. 2d 184, 188-189, 105 P. 2d 299:

> "A further ground urged to establish the insufficiency of the complaint is that the complaint does not allege that plaintiff's invention was a secret invention or allege facts from which such secrecy can be determined. Said statement is true but upon the facts alleged plaintiff is not required to rely upon the secrecy of its invention. We have here a relationship created by a contract where the manufacturer took into his custody certain patterns created by the inventor for the purpose of manufacturing castings from them for the inventor. *Defendant did not acknowledge the dominance of a fundamental precept of honesty and fair dealing, enjoined by the Decalogue and supported by prevailing moral concepts. 'Thou shalt not steal' applies with equal force and propriety to the industrialist of a complex civilization as to the simple herdsman of ancient Israel.* Where a bailee of an article has accepted it under definite

terms to hold it and to use it for the benefit of the bailor, a confidence has been reposed which should remain inviolate. *The mere fact that the ingenious principle materialized in the thing bailed may be known to all the world would not depreciate the sanctity of the contract* between the bailor and the bailee. When a former employee of the Dupont Fabrikoid Company undertook to manufacture leather by use of alleged secret processes learned while in the company's employ, it was held that 'a starting point is not property or due process of law but that the defendant stood in confidential relations with the plaintiffs or one of them.' Continuing, Justice Holmes said: 'Whether the plaintiffs have any valuable secret or not, the defendant knows the facts, whatever they are, through a special confidence that he accepted. The property may be denied, but the confidence cannot be . . . The first thing to be made sure of is that the defendant shall not fraudulently abuse the trust reposed in him. It is the usual incident of confidential relations. If there is any disadvantage in the fact that he knew the plaintiffs' secrets, he must take the burden with the good.' (*E. I. DuPont De Nemours Powder Co. v. Masland,* 244 U. S. 100 [37 Sup. Ct. 575, 61 L. Ed. 1016].) While the inventor of any product of the mind may forfeit his ownership thereof when it becomes known to the public (Civ. Code, sec. 980), yet such forfeiture does not deprive the author of his right to make contracts with reference to his product. Neither does he yield his right to have such contracts protected by the courts where a confidential relationship has been created on the basis of the inventor's secret (*Hamilton Mfg. Co. v. Tubbs Mfg. Co.,* 217 Fed. 401, 407)." (Emphasis supplied).

III.

"The Tendency of the Law Is in the Direction of Enforcing Increasingly Higher Standards of Fairness or Commercial Morality in Trade."

The above caption is a quotation from the opinion of the Hon. Wm. C. Mathes, in the recent case of *Ramirez Co. v. Las Palmas Food Co.* (U. S. D. C., So. Cal., 19355-WM), reported in L. A. Daily Journal, November 12, 1956, page 1, citing *Ross-Whitney Corp. v. Smith, Kline & French Lab.* (9th Cir., 1953), 207 F. 2d 190, 196.

Appellee's brief regards California Civil Code Section 3369 as limiting unfair competition to "palming off" or "secondary meaning."

However, the trade-name and trade-mark cases show that protection against "unfair competition" will be granted even where the defendant is not in competition in any way with plaintiff.

> *Sunbeam Furn. Corp. v. Sunbeam Corp.* (9th Cir., 1951), 191 F. 2d 141;
>
> *Winfield v. Charles* (1946), 77 Cal. App. 2d 64, 70, 175 P. 2d 516 ("Emphasis should be placed on the word 'unfair' rather the 'competition'.")

Appellee's definition of unfair competition necessitates competition between the parties and deception of the public.

However, there is an increasing tendency on the part of the courts to extend the law of unfair competition to acts of business piracy such as those performed by appellee in violating the rights of appellant.

Appellee espouses the law of the jungle in the world of business, but the increasing standards of morality enforced by the courts will not permit flagrantly predatory tactics such as those of appellee.

Although there may not have been "direct trade competition" in the old sense, there was obvious *economic competition,* in that Windsor had only two possible sources of supply:

(1) Appellant, or

(2) Appellee.

Appellant would supply the doors in a package. Appellee would supply extrusions and Windsor would do its own packaging [Ex. 14; R. 199-207].

It is submitted that it is time for our courts to recognize that economic competition exists between parties in the position of appellant and appellee, and that appellee's unfair use of appellant's drawings, and of the dies made therefrom, for which appellant paid a substantial "die charge price" of $1430 [R. 40] is a tort.

This competitive interest is as worthy of protection as the noncompetitive interest in protection of a trademark. The tort is independent of "contract."

IV.

Appellee's Motion to Strike Is Without Merit and Fails to Disclose Prior Motion Below.

Appellee has included in its brief two motions to strike:

First, a motion to strike a portion of appellant's objections to the Findings on the ground that it "was not offered or received in evidence at the trial" (Appellee's Br. p. 2).

Second, Exhibit 14, found at R. 198-207.

Prior Motion.

Appellee neglected to inform this Court that it made a prior motion to strike the first item in the trial court, which was denied without prejudice.

Appellee neglected to inform this court that the trial court had the benefit of affidavits from both sides as to the item sought to be stricken.

Appellee neglects to dispute in any way the genuineness of the item, its obvious inconsistency with appellee's present position as to the applicability and meaning of the contract here involved, and the cogency of the lawyer's reasoning in the letter.

Appellee neglects to inform this court that appellant cited Points and Authorities below to establish the propriety of including a letter in the record which was not part of the evidence (*Rio Grande Co. v. Gildersleeve* (1899), 174 U. S. 603, 43 L. Ed. 102, refusing to strike a letter).

Exhibit 14.

Exhibit 14 is attacked as not being in evidence.

Appellee neglected to inform the court that the Exhibit was designated for this record by appellee, not by appellant.* The exhibit was not cited in the Brief for Appellant, but its mere perusal by the Court will show why appellee is so anxious to strike it out—it is inconsistent with the affidavits, used by appellee to oppose a preliminary injunction in this case.

Conclusion.

Appellee seeks to support the findings and judgment chiefly by reliance on the "evidence" of custom which was not even introduced at the trial. This strongly argues that appellee can find no real support in the record for its position and for the trial court's decision and rationale.

Appellee's Brief has conceded that Paragraph 11 prevents it from using any dies to which it applied, but claims that it is not applicable to the dies made "specifically" for appellant, without independent parol evidence that the dies were made "solely" for appellant. Judicial admissions in the trial court establish beyond cavil that Paragraph 11 was applicable to these dies, and the language of the contract, construed as a whole, likewise makes "applicability" clear. Appellee's conduct, therefore, was a clear breach of contract, and the Findings and Conclusions of Law were in serious and prejudicial error.

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*Appellee will no doubt admit this fact, as the Designation and Counter-designation will be found on pages 64 and 70 of the Transcript of Record docketed in this appeal on March 9, 1956.

Appellee tortiously used appellant's original drawings by using dies constructed therefrom for its own account to enable it to sell extrusions to a customer with whom appellant had refused to deal further unless the outstanding account was paid. Thus, appellee entered into economic competition with appellant, since the customer had a choice of buying only from appellant or appellee. This competition, using appellant's design drawings, was unfair and a tortious misuse of the drawings.

The judgment should be reversed.

THOMAS P. MAHONEY, and
MACBETH & FORD,
Attorneys for Appellant.

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Appellant,

vs.

REYNOLDS METALS COMPANY,

Appellee.

Appeal From the United States District Court, Southern District of California, Central Division.
Hon. Wm. C. Mathes, Judge.

PETITION FOR REHEARING.

THOMAS P. MAHONEY and
MACBETH & FORD,
1709 West Eighth Street,
Los Angeles 17, California,
Attorneys for Appellant-Petitioner.

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No. 15059

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PANAVIEW DOOR & WINDOW CO.,

Appellant,

vs.

REYNOLDS METALS COMPANY,

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Appeal From the United States District Court, Southern District of California, Central Division.
Hon. Wm. C. Mathes, Judge.

PETITION FOR REHEARING.

To the Court:

Pursuant to Rule 23 of this Court, the appellant hereby petitions for a rehearing, upon the following grounds, to wit:

1. This case is of great importance in all industry, because hundreds of businesses have entrusted their secret designs to extruders and others on contracts similar in form to that used in the instant case, and millions of dollars of trade secrets are in jeopardy if neither contractual nor equitable protection is obtainable.

2. This Court's opinion is in conflict with the law as enunciated in other Circuit Courts of Appeals.

verse side will bind the extruder-seller, unless it is expressly referred to by some such reference as:

"Die Charge (Per Par. 11 of Terms and Conditions.)"

This Court has now held that this contract was unambiguous, and that Paragraph 11 concerning use of, and charges for, dies is inapplicable because the specific term "die charge" was not used therein.

Thousands of trade secrets of inestimable value are opened to business piracy by this decision. Reynolds can now use any dies (or other equipment) which it made specifically to a customer's order, according to secret but unpatented designs owned by its customers. It can sell extrusions therefrom just as freely as if it invented the designs itself, or if it had imitated unpatented products without access to the unpublished trade secrets and drawings.

Not only can Reynolds do this—which is to be expected by reason of the fact that they claim such a right and practice—and they did it already—but now the other members of the industry, who, up to now have enjoyed the highest reputation for *not* doing so, can lower their ethics to that of the lowest common denominator in the market place, and, if they so choose, the customer cannot hope to look to the Courts for redress or injunctive relief.

II.

This Court's Opinion Is in Conflict With the Law as Enunciated in Other Circuit Courts of Appeals.

Two conflicts in the circuits are created by the opinion filed.

This Court upholds the findings that there existed "no fiduciary or trust relationship between the parties, and that there was never any disclosure by defendant of any confidential information furnished to it by plaintiff" (Opinion, p. 11).

The fact was undisputed, of course, that appellee had used the trade secret owned by appellant in order to construct a second set of dies to be used for the Windsor order, and that the dies originally constructed for the Panaview order were used, in the interim, by appellee's parts department to fabricate extrusions for the Windsor orders.

The Courts in the Second, Fourth, Sixth and Seventh Circuits have viewed differently the legal relationship created by similar factual situations:

Franke v. Wittschek (2nd Cir., 1953), 209 F. 2d 493;

Ackerman v. General Motors (4th Cir., 1953), 202 F. 2d 643;

Herold v. Herold China & Pottery Co. (6th Cir., 1919), 257 Fed. 911;

Smith v. Dravo Corp. (7th Cir., 1953), 203 F. 2d 369;

Booth v. Stutz Motor Co. (7th Cir., 1932), 56 F. 2d 962.

These cases are discussed in Appellant's Opening Brief, and we will add nothing to that discussion except to emphasize that the cases in the Fourth and Seventh Circuits involved *reversals* of trial courts which had *found no violation of trust and confidence.* In the *Ackerman* case, the inventor, while a patent was pending, disclosed his design to General Motors with a view to sale or license. After returning the inventor's drawings and rejecting his idea as unfeasible, General Motors used the idea in its own manufacture—*not disclosing same to outsiders!* In spite of evidence that General Motors employees claimed to have developed the ideas by independent effort (p. 646) the Court *reversed* the finding of no breach of confidence.

Likewise, in the *Dravo* case in the Seventh Circuit, the inventor furnished blueprints of his container, but defendant rejected the terms offered, and soon put on the market its own infringing product. Again, the findings for defendant were *reversed* and the Court found an implied promise of trust and confidence (p. 377).

SECOND COUNT.

The second conflict created by this decision is as to the law of *judicial admissions,* as to which the Seventh Circuit and the Court of Appeals of the District of Columbia have followed the rule that such admissions are binding, even when made in testimony (see App. Op. Br. pp. 24-25).

III.

Opinion Contains Several Factual Errors on Matters Basic to a Just Decision of This Controversy.

This Court's opinion is factually in error on the basic point of the *terms* and *conditions* of the contract. Appellant's Brief spelled out the language of the contract in careful detail. It provided, on the front side, a list of nine

"Die Charge Prices" [Ex. 21, R. 254-255].

It contained the following printed reference to the *terms and conditions* printed on reverse side:

> "We [Reynolds Metals Company] acknowledge the receipt of your order and the above is an exact copy of our entry thereof. If there are any objections to the above, please notify us AT ONCE. If we do not receive such notice, it will be understood that you accept the basis on which we have entered your order and that fulfillment of the order will be undertaken and deliveries will be made *under the terms and conditions* of the contract evidenced by this acknowledgement. * * *" (Emphasis supplied.)

On the reverse side, there was but one term and condition which related to *dies* or to *charges* for *dies*. It read:

> "1. Contract between buyer and seller: This acknowledgement shall constitute *the entire contract* between Buyer and Seller with respect to the subject matter thereof, and said contract shall not be amended, modified or rescinded except by written agreement signed by an authorized official of each party, expressly referring to this contract. * * *
>
> "1. Equipment: *Any* equipment (including jigs, printing plates or cylinders, *dies* and tools, etc.)

which Seller constructs or acquires specifically and solely for use on Buyer's order shall be and remain Seller's property and in Seller's sole possession and control. *Any charges* made by Seller therefor *shall be for the use of such equipment only.* When Seller has not accepted orders from Buyer for product to be made with such equipment for a period of one year, *Seller may then require Buyer to give disposition of the said equipment,* and in the event such disposition is not given within thirty (30) days after such demand, *Seller may without liability make such disposition as it sees fit or may store the equipment for the account of Buyer, charging Buyer for the storage charges* * * *" (Emphasis supplied.)

Paragraph 11 was meaningless unless it applied to the dies mentioned on the front side. There was *no term and condition* calling for some type of *die charge* other than that described in Paragraph 11. *There was no testimony that die charges were ever made by Reynolds for dies not made specifically and solely as a result of a purchase order from the customer.*

This Court, in quoting Paragraph 11, omitted the *last sentence thereof.* It is submitted that such sentence, *in pari materia,* clearly indicates that the buyer has rights: the dies cannot be detroyed without notice to him; he can be charged storage in certain events. If the word *solely* does not mean that use will be *exclusively* for him, think of how meaningless and absurd this sentence would be! Reynolds could charge storage to Panaview for any dies it had decided to use, for Windsor or for anyone else!

This Court also failed to consider Paragraph 1 on the reverse side, which says the agreement is an integration of the entire understanding of the parties. How can

Reynolds argue that Paragraph 11 requires a separate agreement that the dies be made *solely* for the customer, when the very existence of any separate agreements is negatived by the phraseology of Paragraph 1?

The language of Paragraph 11 definitely indicates that proprietary rights vest in the Buyer. The dies cannot be destroyed or otherwise disposed of without his consent, and he can be charged storage *if he* is not making use of the dies. How absurd it would be if he had to pay storage while the dies were being used by Reynolds for its own profit.

The Court makes something of the fact that Reynolds made two sets of dies—but the evidence was clear that Reynolds used, for the Windsor order, the set Panaview paid for *at first,* and that the second set was a second thought. *Moreover, if Reynolds is privileged to make a second set from our secret designs, where did they derive this privilege?* They did not disclose our design drawings to Windsor, but they *disclosed them to their own employees* who made the second set of dies for Windsor's use. Is that not a breach of confidence?

The evidence showed that the switch from Paragraph 12 to Paragraph 11 occurred about March, 1953 [see revision date on Ex. 2, R. 91]. This was *without notice* to the trade. Appellant, at all stages, has given appellee the benefit of any doubt, and has hence contended that the two forms are identical in significance, the "exclusive" sentence being eliminated and replaced by the word "solely" in the first sentence.

Since, as this Court must realistically realize, the customer does not actually read the fine print on the reverse of each Acknowledgment received, the only fair inference

to make as to the intention of honest people dealing with each other on such matters is that the clauses were both applicable and of similar import.

However, if, as this Court holds, the significance of Paragraphs 11 and 12 in the two forms is clearly different, then appellee has played a most demoniacal trick on an entire industry, by shifting its form in such a clever fashion that dies theretofore made "exclusively" for use of the customer, now merely become the "property" of appellee, and the customer gets no rights except to pay the die charge, to get notice before disposition, and to pay storage charges if appellee decides to charge same.

It is respectfully submitted that even appellee, at all stages, has conceded that Paragraph 11 has more meaning than this Court has given it. Even in its brief and oral argument, the appellee conceded that it applied to "patented" products, for example. The *fact* that patented products are also protected by law, does not prevent parties from acquiring other contractual protection, enforceable in state courts.

The Court argues that the plaintiff thought that the Panador was about to be patented, and therefore it was not concerned about a "sole use" clause when the contract was made.

The Court's position on this ground is hard to understand because (i) it is common knowledge that the issuance of patents is not automatic, (ii) *the patent application related to the door itself and not to the dies,* and (iii) the plaintiff needed contractual protection during the prolonged period of patent prosecution.

As a matter of fact, contractual protection of the dies themselves is so important, that a clause relating to ex-

clusive use of dies on which a charge has been made is universal in the extrusion industry—even though the exact form and content varies between competing extruders.

If, however, plaintiff so felt, that no contract was necessary, as the Court finds, what did defendant feel? Would a defendant make dies for a product other than for "sole" use of a customer, knowing a patent was pending on the product? Would Reynolds, in good faith, at that stage—realizing a patent on the door might issue—make dies which it intended to have a right to use for its own Parts Department? Was not this idea of using the dies for its own Parts Department one which suddenly occurred when Windsor brought to its attention the possibility of a large order in direct competition with Panaview? Was not the implied-in-law protection given to designs submitted for a business purpose a matter which both parties are presumed to know, being a matter of law? (See cases cited under Point II of this Petition.) Does not the confidential submission of a trade secret imply protection even without an express contract?

This Court should bear in mind the purpose of Paragraph 11 and of similar clauses in other contracts. Many manufacturers do require their customers to buy and own the dies and other special tools or equipment necessary to manufacture. Others, like Reynolds, do not want the customers to own the dies outright—because they want the repeat orders, which are the cream of any job shop business, for as know-how improves, profits increase. Hence, Reynolds inserts a clause to change the normal outright sale of the dies into a limited sale, title not passing for at least one year after completion of the last order calling for use of the dies. At that time, rather than clutter up its shop, Reynolds will dispose of the

dies, as the customer directs—ship them to him, destroy them, or put them in storage at the customer's expense. No customer would pay a die charge without getting something for his money—at least the right to repeat his order without paying a new die charge!

Hence, it seems clear that the very purpose of Paragraph 11 was to prevent the "die charge price" from meaning a *sale*. The *face* of the contract is entirely in the language of *buyer* and *seller* [R. 91, "sold to"]. It is unambiguous in that respect. It can be modified only by reference to the terms and conditions on the reverse. What does "Price" mean—by reference to the reverse? It clearly *means* a sale—unless Paragraph 11 limits it! The language is all "buyer and seller," and the "price" is even subject to change, under Paragraph 10 [R. 92].

This Court concludes that Reynolds has two types of die charges:

> (1) a Paragraph 11 die charge which gives the buyer only a limited property right to exclusive use, a right to consultation before the die is disposed of, and a corresponding duty to pay certain storage charges.
>
> (2) a non-Paragraph 11 "die charge price" which gives the "buyer" no rights and under which he is not even a "buyer."

This agreement was drafted by Reynolds. What is there which could lead a "buyer" to believe that he was paying the second type of "die charge" and getting no rights, when no such type of charge is mentioned in the terms and conditions? Why should he think Paragraph 11 was meaningless and applicable to nothing? If the agreement is clear on its face, that Paragraph 11 does not

apply, would it not be his normal inference that he was to own the dies?

The argument on *sales tax* is of no weight. California does not *require* a seller to collect sales tax—he is merely required to pay it, and if he absorbs it not to advertise or talk about it (Stats. of Calif., 1933, Sec. 8, p. 2602; *cf. de Aryan v. Akers,* 12 Cal. 2d 781, 783). Moreover, here it was undisputed that the *dies* were at all times in Arizona—not subject to California sales tax. And there is no evidence that Arizona would impose a sales tax on the dies, whether Panaview owned them outright or had merely a "sole use" right. So far as appellant can ascertain, Arizona has *no sales tax* (*cf.* Martindale-Hubbell, Law Digest, 1957, Vol. 3, re Arizona Occupation Tax).

Moreover, the normal result of a contract listing dies and listing a *die charge price* is to effect a sale. The *very* purpose of Paragraph 11 is to convert what is normally a *sale* into a limited and special type of sale-bailment contract. *Finally, if a sales tax is applicable, buyer agreed to pay it by the express terms and conditions* [see Par. 8, R. 92].

IV.

Appellee's Cost Bill Should Be Taxed in Accordance With Rule 17(6).

Appellee has submitted a cost bill of $1,383.15.

It is submitted that appellee's bill should be taxed or stricken, in the light of Rule 17(6) of this Court—because appellee padded the record unnecessarily with many, many pages of expensive, unnecessary printing:

First, appellant paid $380.00 for that portion of the record it designated for printing, as compared with the $830.09 paid by appellee.

Second, appellee's brief of 76 pages does not cite a *single* important reference to any portion of the record other than that designated and printed at appellant's request! (except per Third, below).

Third, appellee even has sought to collect costs from appellant for the printing in ten pages of the Printed Record the now famous Windsor memo of November 26, 1954, which *appellee designated for printing and later moved to strike*—a motion which this Court granted [R. 198-207].

It is submitted that simple justice and the plain language of Rule 17(6) should lead this Court to disallow costs to appellee because of their unnecessary increase in the size and cost of the record.

Additionally, this Court's opinion in two places refers to the length of the Printed Record, in the vein that appellant is accused of seeking to convince the Court that such a long record contains no evidence to support the findings. Perhaps if the Record were shorter—containing only the pages designated by appellant, appellant's case would not have been prejudiced by the length of the Printed Record.

Wherefore, appellant prays that a rehearing be granted, that the judgment be reversed, that the costs be taxed and for all other proper relief.

Respectfully submitted,

THOMAS P. MAHONEY and
MACBETH & FORD,
Attorneys for Appellant-Petitioner.

Certificate of Counsel.

In our judgment this foregoing petition for rehearing is well founded, and it is not interposed for delay.

MACBETH & FORD and
THOMAS P. MAHONEY,
By PATRICK H. FORD,
Attorneys for Appellant-Petitioner.